This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

200

~~Tot. to confess~~

CT
BRK
XHc

CASES

ON

PRIVATE CORPORATIONS

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

HARRY SANGER RICHARDS

LL. B. (HARVARD), LL. D. (IOWA)

PROFESSOR OF THE LAW OF CORPORATIONS AND DEAN OF THE LAW SCHOOL, UNIVERSITY OF WISCONSIN

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT

GENERAL EDITOR

ST. PAUL

WEST PUBLISHING COMPANY

1912

COPYRIGHT, 1912
BY
WEST PUBLISHING COMPANY
(RICH.CORP.)

THE AMERICAN CASEBOOK SERIES

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly; principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*

Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Wm. Underhill Moore.)

Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)

Edward S. Thurston, Professor of Law, George Washington University. *Subject, Quasi Contracts.*

Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*

Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*

Frederic C. Woodward, Dean of the Stanford University Law School. *Subject, Sales.*

James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

JAMES BROWN SCOTT,
General Editor.

WASHINGTON, D. C., November, 1912.

Following are the books of the Series now published, or in press:

Administrative Law	Damages
Bills and Notes	Partnership
Carriers	Persons
Conflict of Laws	Pleading
Corporations	Suretyship
Criminal Law	Trusts
Criminal Procedure	Wills and Administration

TABLE OF CONTENTS

CHAPTER I

CHARACTERISTIC FEATURES OF A CORPORATION

Section		Page
1.	The Corporation as Distinguished from Other Forms of Business Association	1
2.	The Corporation as Distinguished from its Stockholders	18
3.	The Corporation as a Person	47

CHAPTER II

FORMATION

1.	Steps Essential to Organization	60
2.	Effect of Failure to Comply With the Statute—De Facto Corporations	79
3.	Subscription to Stock	112
4.	Promoters	164
	I. The Promoter as a Fiduciary	164
	II. Promoters' Contracts and Corporate Liability	186

CHAPTER III

POWERS AND LIABILITIES

1.	Interpretation of Charters and Franchises	209
2.	Implied Powers	216
3.	Ultra Vires Acts	285
	I. In General	285
	II. Executory and Partly Executed Contracts	306
	III. Executed Contracts and Ultra Vires Leases	318
	IV. Ultra Vires Transfers as a Source of Title	335
	V. Estoppel	359
	VI. Rights in Quasi Contract	369
	VII. Torts	381
	VIII. Crimes	396

CHAPTER IV

RIGHTS OF STOCKHOLDERS

1.	Rights Incident to Status	407
	I. Right to Inspect Records	407
	II. Voting Rights	418
	III. Dividends	445
	IV. Distributive Share	470
2.	Powers of Majority	477
3.	Representative Suits	490
4.	Transfer of Stock	572

CHAPTER V

DIRECTORS

Section		Page
1.	Powers and Liabilities	603
2.	Remedies Against Directors	652

CHAPTER VI

LEGISLATIVE CONTROL

1.	Power of the Legislature to Repeal the Corporate Charter	658
2.	Power of the Legislature to Alter or Amend the Corporate Charter	665

CHAPTER VII

DISSOLUTION

1.	Methods of Dissolution	692
2.	Causes for Dissolution	706
3.	Effect of Dissolution	712

CHAPTER VIII

CREDITORS OF THE CORPORATION

1.	Rights and Remedies at Law and in Equity Against the Corporation	730
2.	Creditors' Rights Against Transferees of Corporate Property	758
3.	Creditors' Rights as Affected by Merger or Consolidation	779
4.	Creditors' Right as Affected by Dissolution	789
5.	Creditors' Rights Against Stockholders and Their Transferees	793
	I. At Common Law	793
	II. By Statute	836
6.	Creditors' Rights Against the Officers of the Corporation	848

TABLE OF CASES

[CASES CITED IN FOOTNOTES ARE INDICATED BY ITALICS. WHERE SMALL CAPITALS ARE USED, THE CASE IS REFERRED TO IN THE TEXT]

	Page
Abbott v. Hapgood	188
Aberseen R. Co. v. Blakie Bros.	632
ABRATH v. NORTHEASTERN R. Co.	395
Adams v. Johnson	586
Adams & Westlake Co. v. Deyette	278
Adler v. Milwaukee Patent Brick Mfg. Co.	795
ALLEN v. CHURCH	767
Allen v. North Des Moines M. E. Church	761
ALLEN v. RAILROAD Co.	601
ALLEN v. RUSSELL	474
Almada & Tirito Co., In re	817
Alton Mfg. Co. v. Garrett Biblical Institute	241
American Loan & Trust Co. v. General Electric Co.	248
American Railway-Frog Co. v. Haven	423
AMMANT v. PRESIDENT, ETC.	733
Anvil, The v. Savery	742
Appleton v. Citizens' Cent. Nat. Bank	260
Archer's Case	649
Arkansas Pass Harbor Co. v. Manning	612
ASHBURY RY. CARRIAGE & IRON Co. v. RICHE	279
ASIATIC BANKING Co., IN RE	265
ATHOL MUSIC HALL Co. v. CAREY	120
Atlantic & B. R. Co. v. Johnson	789
Atlantic & G. R. Co. v. Georgia	703
Atlantic & P. Tel. Co. v. Union Pac. R. Co.	331
Attorney General, Ex parte	725
ATTORNEY GENERAL v. STEVENS	107
Attorney General v. Superior & St. C. R. Co.	701
Attorney General v. Tudor Ice Co.	710
Atwool v. Merryweather	519
Aurora Soc. v. Paddock	244
AUSTIN v. TECUMSEH NAT. BANK	781
Automatic Self-Cleansing Filter Syndicate Co. v. Cunningham	604
Avondale Land Co. v. Shook	678
Bacon v. Robertson	715
Badger Paper Co. v. Rose	135
BAGSHAW v. EASTERN COUNTIES R. Co.	504
Bahia & S. F. R. Co., In re	594
Baker Furniture Co. v. Hall	771
Baldwin v. Canfield	534
Ball Electric Light Co. v. Child	844
Ballin v. Merchants' Exch. Bank	774
Ballin v. Mossbacher	774
Baltzell v. Church Home & Infirmary of Baltimore	30
Bangor Electric Light & Power Co. v. Robinson	586
BANK v. STOWELL	589
BANK OF AUGUSTA v. EARLE	75, 340
BANK OF COLUMBIA v. PATTERSON'S ADM'RS	387
Bank of Poughkeepsie v. Ibbotson	841
Bank of St. Mary's v. St. John Powers & Co.	747
Bank of United States v. Planters' Bank of Georgia	41
Banks v. Poitiaux	339
Barber v. International Co. of Mexico	747
Bardstown & L. R. Co. v. Metcalfe	215, 254
BARNED'S BANK, IN RE	265
BARONESS WENLOCK v. RIVER DEE Co.	374
Baroness Wenlock v. River Dee Co.	369
BARRY v. MERCHANTS' EXCH. Co.	293
BARTLETT v. DREW	762
Bartlett v. Drew	846
Bateman v. Mid-Wales R. Co.	241
Bates v. Coronado Beach Co.	264
Bath Gas Light Co. v. Claffy	314
Bathe v. Decatur County Agricultural Soc.	390
Battelle v. Northwestern Cement & Concrete Pavement Co.	188
Bausman v. Kinnear	806
Bayless v. Orne	652
BEATTY v. MARINE INS. Co.	383
Beatty v. Northwestern Transp. Co.	483
Beckett v. Houston	428
Beers v. Bridgeport Spring Co.	452

	Page
Bellerly v. Rowland & Marwood's S. S. Co.	284
Bellows v. Hallowell & Augusta Bank	759
Benbow v. Cook	78
Bentinck v. Fenn	183
Berea College v. Commonwealth of Kentucky	682
Bergeron v. Hobbs	84
Bergeron v. Hobbs	65
BEST BREWING CO. v. KLASSEN	259
Bigelow v. Gregory	92
Binghampton Bridge, The	215
Bish v. Johnson	497
Bissell v. Michigan Southern & N. I. R. Cos.	285, 389
Blackburn & District Ben. Bldg. Soc. v. Cunliffe, Brooks & Co.	318
BLUM v. WHITNEY	177
Boice v. Hodge	844
Boldenweck v. Bullis	548
Booth v. Robinson	264
Booth v. Robinson	657
Boston Beer Co. v. Massachusetts	685
Boston Glass Manufactory v. Landgon	698
Boston Music Hall Ass'n v. Cory	581
Bowden v. Johnson	846
Boyd v. American Carbon Black Co.	326
Boyer v. Nesbitt	441
Brandenstein v. Hoke	83
Brant v. Ehlen	831
Breene v. Merchants' & Mechanics' Bank	777
Briggs v. Spaulding	617
British Seamless Paper Box Co., In re	170
Brown v. Citizens' Ice & Cold Storage Co.	244
Brown v. Hitchcock	846
Brown v. Winnisimmet Co.	229
Brunswick Gas Co. v. United Gas Co.	380
Bryant's Pond Steam-Mill Co. v. Felt	116
Buffalo Lubricating Oil Co. v. Standard Oil Co.	394
Burland v. Earle	647
Burrill v. Nahant Bank	614
BURT v. RATTLE	464
Button v. Hoffman	18
Byrne v. Schuyler Electric Mfg. Co.	497
Byronville Creamery Ass'n v. Ivers	65
California Bank v. Kennedy	318
Camden & Atlantic R. Co. v. Mays Landing, etc., Co.	314
Campbell v. Watson	627
CAPITAL CITY WATER CO. v. MACDONALD	708
Carmody v. Powers	188
Catlin v. Eagle Bank of New Haven	771
Catskill Bank v. Gray	264
Central Branch, Union Pac. R. Co. v. Western Union Tel. Co.	331
Central Transp. Co. v. Pullman Co.	334
Central Transp. Co. v. Pullman Palace Car Co.	300
Chadwick v. Old Colony R. Co.	245
Chaffee v. Rutland R. Co.	460
Chamberlin v. Huguenot Mfg. Co.	698
Chapman v. Bates	435
Charles River Bridge v. Warren Bridge	209
Charlestown Boot & Shoe Co. v. Dunsmore	603
Chenango Bridge Co. v. Binghamton Bridge Co.	215
Chestnut Hill & Spring House Turnpike Co. v. Rutter	331
Chewacla Lime Works v. Dismukes	378
Chicago Hansom Cab Co. v. Yerkes	483
Chicago, M. & St. P. R. Co. v. Supervisors	215
Chicago & N. W. R. Co. v. Ellson	732
Chicago & N. W. R. Co. v. Forest County	735
Christensen v. Eno	826
Christian Union v. Yount	352
CHUBB v. UPTON	159
Citizens' Life Assur. Co. v. Brown	395
Citizens' Sav. Bank v. Owensboro	665
City of Atlanta v. Gate City Gaslight Co.	71
City of Louisville v. Louisville Water Co.	39
City of Louisville v. McAteer	39
Clapp v. Peterson	798
Clapp v. Peterson	278
Clark v. Bever	823
Clark v. Farrington	219
Clark v. Memphis St. R. Co.	265
Clarksville & R. Turnpike Co. v. Montgomery County	215
Clearwater v. Meredith	706
Clough v. Rocky Mountain Oil Co.	761
Coe v. Columbus, etc., R. Co.	215
Coit v. North Carolina Gold Amalgamating Co.	821
Cole v. Millerton Iron Co.	761
Coleman v. White	841

	Page
Collins v. Sherman	215
Coltman, In re	361
Commonwealth v. Bringhurst	429
Commonwealth v. Eastern R. Co.	672
Commonwealth v. Essex Co.	665
Commonwealth v. Prop. of New Bedford Bridge	401
Compton v. Waco Bridge Co.	215
Cone v. Russell	432
Congregational Church Bldg. Soc. v. Everett	359
Continental Nat. Bank v. Eliot Nat. Bank	583
Cook v. Chittenden	154
Coppin v. Greenlees & Ransom Co.	284
Corbus v. Alaska Treadwell Gold Min. Co.	525
Corning v. McCullough	836
CORRUGATING Co. v. THACHER	851
Covington Drawbridge Co. v. Shepherd	737
COX v. BANK	590
Craig v. Hesperia Land & Water Co.	583
Craycraft v. National Building & Loan Ass'n	470
CREASE v. BABCOCK	667
Crocker v. New York	215
Crown Cork & Seal Co. v. State	39
Cumberland Coal & Iron Co. v. Sherman	641
CUNLIF v. MANCHESTER & B. CANAL Co.	495
CUNLIFFE v. MANCHESTER & B. CANAL Co.	504
Cunningham v. German Ins. Bank	612
Curran v. State of Arkansas	793
Curson v. African Co.	758
CUTTING v. MARLOR	625
Daniel v. Gold Hill Min. Co.	580
DANIELS v. DAVISON	773
David Payne & Co., In re	361
Davis v. Edwards	742
Davis v. Old Colony R. R.	305
Davis v. Stevens	81
Day v. Spiral Springs Buggy Co.	378
DECAMP v. DOBBINS	350
Delaware & H. Co. v. Albany & S. R. Co.	564
Densmore Oil Co. v. Densmore	180
Denton v. Livingston	572
Denver Fire Ins. Co. v. McClelland	315
De Pass' Case	814
DICKINSON v. CENTRAL NAT. BANK	582
DIMPFEL v. RAILROAD Co.	546
Directors, etc., of Ashbury Ry. Carriage & Iron Co. v. Riche	301
Discoverer's Finance Corp., In re	586
DOCTOR v. HARRINGTON	569
Dodge v. Pyrolusite Manganese Co.	740
Dodge v. Woolsey	503
Donnell v. Herring-Hall-Marvin Safe Co.	24
Donnelly v. Sampson	526
Dorris v. French	139
Dorsey Mach. Co. v. McCaffrey	394
Dovey v. Cory	627
Dow v. Northern R. R.	50
Dow v. Northern R. Co.	497
Downer v. Union Land Co. of St. Paul	827
DRONFIELD SILKSTONE COAL Co., IN RE	283
Dr. Salmon v. Hamborough Co.	795
Dudley v. Kentucky High School	477
Duncuft v. Albrecht	580
Dunphy v. Travelers' Newspaper Ass'n	523
Dunston v. Imperial Glass Co.	507
Dupee v. Boston Water Power Co.	278
Durfee v. Old Colony R. Co.	678
Dykman v. Keeney	654
D. & J. F. Edwards v. Fairbanks & Gilman	335
Eagle Ins. Co. v. Ohio	688
Earle v. Carson	846
East Anglian Rys. Co. v. Eastern Counties R. Co.	318
Eastern Counties R. Co. v. Broom	380
Easton Nat. Bank v. American Brick & Tile Co.	831
EATON v. WALKER	82
Edwards v. Midland R. Co.	394
Edwards v. Warren Linoline & Gasoline Works	8
ELEVATOR Co. v. RAILROAD Co.	262
Emerson v. Gaither	657
Empress Engineering Co., In re	190
English & Colonial Produce Co., In re	194
Erie & North East R. Co. v. Casey	665
Erlanger v. New Sombrero Phosphate Co.	180
Ervin v. Oregon Ry. & Nav. Co.	487
Estey Mfg. Co. v. Runnels	100
European Assur. Soc., In re	778
Ewing v. Composite Brake Shoe Co.	778
Family Endowment Soc., In re	778
Farmers' Bank of Vine Grove v. Smith	206
Farmers' Loan & Trust Co. v. New York & N. R. Co.	487

	Page
Farnsworth v. Lime Rock R. Co.	68
Farrington v. Putnam	359
Farwell Co. v. Sweetzer	777
Farwell & Co. v. Wolf	308
Ffooks v. Southwestern R. Co.	548
FIDELITY TRUST CO. v. LEHIGH VAL. R. CO.	468
FIFTH AVE. BANK OF NEW YORK v. FORTY-SECOND ST. & G. ST. FERRY R. CO.	601
Finnegan v. Knights of Labor Bldg. Ass'n	79
Finney v. Bennett	742
First Ave. Land Co. v. Parker	597
FIRST NAT. BANK v. GUSTIN	830
First Nat. Bank v. National Exch. Bank of Baltimore	266
Fisk v. Union Pac. R. Co.	790
Fiske's Estate, In re	345
FLETCHER v. PECK	662
Flinn v. Bagley	826
Fogg v. Blair	783
FOLGER v. COLUMBIAN INS. CO.	715
Ford v. Easthampton Rubber Thread Co.	457
FOREMAN v. BIGELOW	835
Forrest v. Manchester, S. & L. R. Co.	534
Foss v. Harbottle	509
Foster v. Potter	574
Foster v. White	409
Fox v. Horah	719
Franklin Co. v. Lewiston Institution for Savings	361
Franklin Co. v. Lewiston Institution for Savings	274
Fraser v. Ritchie	274
Fulkerson v. Taylor	732
Gallagher v. Germania Brewing Co.	45
Galvin v. Shaw	2
GAMBLE v. WATER CO.	481
Garmany v. Lawton	612
GASHWILER v. WILLIS	27
Gashwiler v. Willis	608
GASLIGHT CO. v. CLAFFY	379
Geer v. School Dist.	507
George Whitechurch v. Cavanagh	597
Geurinck v. Alcott	264
Gilchrist v. Highfield	278
Gilman v. Goss	154
Given v. Simpson	2
Glenn v. Busey	118
Gluckstein v. Barnes	180
Glymont Improvement & Excursion Co. v. Toller	75
Goddard v. Importing Co.	763
GOOCH v. MCGEE	731
GOODMAN v. JEDIDJAH LODGE, ETC.	693
GOODRICH v. CITY L. & B. ASS'N	474
Goodspeed v. East Haddam Bank	390
Goodwin v. McGehee	808
Graham v. La Crosse & M. R. Co.	752
GRAHAM v. RAILROAD CO.	745
Grand Lodge v. Waddill	378
Greeley v. Smith	789
Greenwood v. Union Freight R. Co.	658
Gress v. Knight	158
Gress v. Knight	813
Griffith v. Boom & Lumber Co.	719
Grommes v. Sullivan	241
Guckert v. Hacke	100
Hale v. Cheshire R. Co.	675
HALL v. KLINCK	842
Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.	22
Hamilton v. Menominie Falls Quarry Co.	758
Hamsher v. Hamsher	345, 359
Handley v. Stutz	826
HANSON v. LITTLE SISTERS OF THE POOR	357
Harris v. First Parish in Dorchester	838
Harris v. Independence Gas Co.	306
Hartford & N. H. R. Co. v. Boorman	813
Hawes v. Oakland	548
Hawes v. Oakland	508
Hawley v. Upton	141
Hawthorne v. Calef	838
Hayward v. Lecson	180
Hearst v. Putnam Min. Co.	41
Heath v. Barmore	723
Heath v. Silverthorn Mining & Smelting Co.	75
Hellman v. Pennsylvania Electric Vehicle Co.	475
Henderson v. Royal British Bank	808
HENRY v. BABCOCK	413
Henry v. Vermillion & A. R. Co.	804
Hess v. W. & J. Sloane	260
Hibbs v. Brown	12
Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.	766
Higgins v. California Petroleum etc., Co.	761
Higgins v. Illinois Trust & Savings Bank	836
Higginson & Dean, In re	725
Hightower v. Thornton	795
Hill v. Manchester & Salford Waterworks	507
Hinckley v. Schwarzschild & Sulzberger Co.	682

	Page
HOADLEY v. COUNTY COM'RS	10
Hodge v. United States Steel Corp.	536
Hodges & Wilson v. Silver Hill Min. Co.	798
HOFFMAN STEAM COAL CO. v. CUMBERLAND COAL & IRON CO.	642
Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.	637
Hollins v. Brierfield Coal & Iron Co.	742
Holyoke Bank v. Burnham	846
Home Fire Ins. Co. v. Barber	541
Horst v. Traudt	514
Hospes v. Northwestern Mfg. Co.	831
House of Mercy v. Davidson	351
Howard v. Patent Ivory Co.	189
Howe v. Boston Carpet Co.	268
Hoyt v. Thompson's Ex'rs	612
Hubbard v. Worcester Art Museum	352
Hudson Real Estate Co. v. Tower	121
HUN v. CARY	626
Hunt v. O'Shea	460
Huntington v. Attrill	858
Hurd v. New York & Commercial Laundry Co.	771
Hutchinson v. Green	608
Hutchinson v. Western Atlantic R. Co.	389
Imperial, etc., Hotel Co. v. Hampson	654
Imperial Land Co. of Marseilles, In re	802
Imperial Mer. Credit Ass'n, In re	815
Indianapolis, C. & L. R. Co. v. Jones	785
Inhabitants of Worcester v. Western R. Co.	215
Jackson v. Meek	844
Jacksonville, M. P. R. & Nav. Co. v. Hooper	232
Janesville Bridge Co. v. Stoughton	215
Jeaffreson, Ex parte	802
Jemison v. Citizens' Sav. Bank	308
JOHNSON v. CORSER	80
Jones, In re	8
JONES v. CINCINNATI TYPE FOUNDRY CO.	102
JONES v. HABERSHAM	357
Jones v. Habersham	359, 685
Jones v. Missouri-Edison Electric Co.	706
Jones v. Williams	614
Juristic Person, The	59
Just v. Idaho Land & Imp. Co.	541
Kadish v. Garden City E. L. & B. Ass'n	318
Kavanaugh v. Commonwealth Trust Co.	627
Kearris v. Leaf	751
Kelner v. Baxter	190
Kelner v. Baxter	190
Kenosha, R. & R. I. R. Co. v. Marsh	674
Keokuk & W. Ry. v. Missouri	706
Kessler & Co. v. Ensley Co.	514
Kimball v. Cedar Rapids	555
KING, THE v. BIGGS	387
King v. Masters & Wardens of Merchant Tailors' Co.	407
King v. Paterson & H. R. Co.	457
Kirwin v. Washington Match Co.	612
Koehler & Co. v. Reinheimer	260
KRAFT v. BREWING CO.	259
Kreissl v. Distilling Co. of America	440
Lagunas Nitrate Co. v. Schroeder & Co.	457
Langhorne v. Richmond R. Co.	786
Lauman v. Lebanon Val. R. Co.	675
Lauraglenn Mills v. Freidheim & Bro.	841
Lauraglenn Mills v. Roddy	841
Lauraglenn Mills v. Ruff	841
Layng v. A. French Spring Co.	265
Leazure v. Hillegas	336
Le Blanc, Petition of	460
Lehigh Val. R. Co. v. Dupont	264
LE ROY v. GLOBE INS. CO.	458
Lindlar's Case	586
Lipscomb v. Condon	583
LIVINGSTON v. LYNCH	494
Livingston County Agricultural Soc. v. Hunter	761
Long v. Georgia Pac. R. Co.	324
Lord v. Equitable Life Assur. Soc. of United States	678
Louisville Banking Co. v. Eisenman	703
Louisville, N. A. & C. Ry. Co. v. Boney	732
Louisville, N. A. & C. R. Co. v. Louisville Trust Co.	363
Low v. Railroad	208
Lowe v. Pioneer Threshing Co.	278
LOWRY v. BANK	590
Luedecke v. Des Moines Cabinet Co.	766
Lydney Megpoal Iron Ore Co. v. Bird	184
McArthur v. Times Printing Co.	189
McClaine v. Rankin	838
McCormick v. Market Nat. Bank	318

	Page
McCutcheon v. Merz Capsule Co.	331
McDonald v. Dewey	846
McDonald v. Williams	801
McGraw's Estate, In re	345
Machinists' Nat. Bank v. Field	597
McLay v. Corporation of Bruce	396
McLeary v. Erie Telegraph & Telephone Co.	483
McMillan v. Maysville & L. R. Co.	144
MACON & WESTERN R. Co. v. PARKER	739
Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.	339
Mallory v. Hanaur Oil-Works 260,	329
Mallory v. Hanaur Oil-Works	329
Marble Co. v. Harvey	315
MARCH v. RAILROAD	604
Marion Trust Co. v. Blish	161
Marion Trust Co. v. Crescent Loan Co.	362
Marr v. Bank of West Tennessee	777
MARSHALL v. BANK	626
MARSHALL v. R. Co.	57
Marshall v. Western N. C. R. Co.	761
Marsters v. Umpqua Val. Oil Co.	852
Martin v. South Salem Land Co.	813
MARTIN v. WEBB	625
Marysville Electric Light & Power Co. v. Johnson	133
Mason v. Carrothers 180,	529
MASON v. HARRIS	516
Mason v. Stevens	83
Mason v. Supreme Court of Equitable League of Baltimore City	692
Matteson v. Dent	838
MATTINGLY v. NYE	754
Melhado v. Porto Alegre, N. H. & B. R. Co.	190
MELVIN v. LAMAR INS. CO.	157
Memphis R. Co. v. Commissioners	215
MENIER v. TELEGRAPH WORKS	481
Mercantile Trading Co., In re	801
Mercantile Trust Co. v. Missouri, K. & T. R. Co.	742
Merchants' Nat. Bank v. Wehrmann	3
Mexican & South American Co., In re	814
Mexican & South American Co., In re	815
MICKLES v. ROCHESTER CITY BANK	611
MIERS v. ZANESVILLE & M. TURNPIKE CO.	804
Miers & Caulson v. Zanesville & Mayville Turnpike Co.	777
Mills v. Central R. Co.	678
Mills v. Hawker	389
Mills v. Northern Ry. of Buenos Ayres Co.	748
Milwaukee Cold Storage Co. v. Dexter	183
Milwaukee & St. P. R. Co. v. Supervisors	215
Miners' Ditch Co. v. Zellerbach	361
Minneapolis Threshing Mach. Co. v. Davis	150
Mitchell v. Hotchkiss	856
Montgomery & West Point R. Co. v. Branch Sons & Co.	785
Monument Nat. Bank v. Globe Works	359
MOORE v. BUTLER	773
MOORE v. WHITCOMB	696
Morgan v. Lewis	284
Morrison v. American Snuff Co.	789
Moss v. Averell	216
Moss v. Rossie Lead Min. Co.	861
Mower v. Staples	497
Mowrey v. Indianapolis & C. R. Co.	497
Mumma v. Potomac Co.	790
Munson v. S. G. & C. R. Co.	636
Nappanee Canning Co. v. Reid, Murdock & Co.	852
Nassau Bank v. Jones	273
Nassau Bank v. Jones	311
Nathan v. Whitlock	815
National Bank v. Wilmington N. C. & S. R. Co.	789
National Bank of Jefferson v. Texas Inv. Co.	759
National Discount Co. v. Mid-Wales R. Co.	241
NATIONAL DOCKS R. Co. v. CENTRAL R. Co.	108
National, etc., Bldg. Soc., In re	373
National Funds Assur. Co., In re	855
National Home Bldg. Ass'n v. Home Sav. Bank	318
National Motor Mail Coach Co., In re	197
NATUZEH v. IRVING	494
Neall v. Hill	654
Nebraska Chicory Co. of Schuyler, Neb., v. Lednicky	123
Newcomb-Endicott Co. v. Fee	100
New Orleans, J. & G. N. R. Co. v. Harris	491
Newton Mfg. Co. v. White	701
Newton Nat. Bank v. Newbegin	810
New York Cent. & H. R. Co. v. United States	403
New York, L. E. & W. R. Co. v. Nickals	466
New York & L. I. Bridge Co. v. Smith	694

	Page
New York & N. H. R. Co. v. Schuyler	602
NICHOLLS' CASE	834
Nims v. Mt. Hermon Boys' School	389
Noble v. Callender	805
North v. Forest	580
North Australian Territory Co., In re	649
NORTHERN TRUST CO. v. SNYDER	527
North Missouri R. Co. v. Miller	114
North Side R. Co. v. Worthington	254
Northumberland Hotel Co., In re	189
Northwestern Union Packet Co. v. Shaw	376
NORWICH v. NORFOLK RY.	230
OAKES v. TURQUAND	158
Oakes v. Turquand & Harding	810
OAKES & PEEK, EX PARTE	803
Oakland R. Co. v. Oakland Brooklyn R. Co.	695
O'BRIEN v. FITZGERALD	655
O'Conner Min. & Mfg. Co. v. Coosa Furnace Co.	850
Old Colony R. Co. v. Chadwick	245
Old Dominion Copper Co. v. Bigelow	180
Old Dominion Copper Mining & Smelting Co. v. Lewisohn	174
OLIVER LEE & CO.'S BANK, MATTER OF	677
Ooregum Gold Min. Co. v. Roper	820
Oregon R. Co. v. Oregonian R. Co.	318
Osewego Falls Bridge Co. v. Fish	215
Ossipee Mfg. Co. v. Canney	361
Ottumwa Screen Co. v. Stodghill	583
Overend, Gurney & Co. v. Mid-Wales R. Co.	241
Overton Bridge Co. v. Means	730
Owensboro Wagon Co. v. Bliss	89
PAPE v. CAPITOL BANK	109
Park v. Grant Locomotive Works	451
Parker v. Nickerson	649
Parrot v. Lawrence	215
Parsons v. Joseph	545
PEARCE v. RAILROAD CO.	255, 366
Peirce v. Partridge	507
Pellio v. Bulls Head Coal Co.	529
Penn Match Co. v. Hapgood	186
PENNIMAN v. BRIGGS	697
PENNSYLVANIA, ETC., STEAM NAV. CO. v. DANDRIDGE	230
PENNSYLVANIA R. CO. v. ST. LOUIS, A. & T. H. R. CO.	233
PEOPLE v. CHEESEMAN	63
People v. Cheeseman	60
People v. Dashaway Ass'n	710
People v. Devin	418
People v. Globe Mut. Life Ins. Co.	715
People v. Hill	421
People v. Improvement Co.	710
People v. Montecito Water Co.	62
PEOPLE v. NATIONAL TRUST CO.	717
People v. New York Building Loan Banking Co.	477
People v. North River Sugar Refining Co.	54
People v. North River Sugar Refining Co.	264
People v. O'Brien	665
People v. Phœnix Bank	710
People v. Pullman Co.	219
People v. Rochester Ry. & Light Co.	402
PEOPLE v. SECURITY LIFE INS. CO.	716
PEOPLE v. STOCKTON & V. R. CO.	63
People ex rel. Britton v. American Press Ass'n	413
PEOPLE EX REL. COOPER UNION v. GASS	679
People ex rel. National Exp. Co. v. Coleman	4
People ex rel. Union Trust Co. v. Coleman	32
People's Pleasure Park Co. v. Rohleder	27
PERCY v. MILLAUDON	620
Perkins v. Trinity Realty Co.	311, 341
Perrine v. Canal Co.	215
PETERS v. BAIN	826
Philadelphia, etc., R. Co. v. Quigley	396
PHILADELPHIA, W. & B. RY. v. COWELL	458
Phillips v. Providence Steam-Engine Co.	226
PIERCE v. EMERY	249
Pierce v. Security Co.	844
Pietsch v. Milbrath	180
Pikes Peak Co. v. Pfuntner	651
Pitcher v. Lone Pine-Surprise Consol. Min. Co.	545
Pittsburg, In re	8
Pittsburg Min. Co. v. Spooner	164
Pittsburgh & S. R. Co. v. Biggar	146
Plant v. Macon Oil & Ice Co.	233
PLANTERS' BANK v. LEAVENS	576
Planters' Fire & Marine Ins. Co. v. State of Tennessee	65
Platt v. Archer	790
Plymouth R. Co. v. Colwell	732
Pollard v. Bailey	841
Pollitz v. Gould	537
Pond v. Framingham & L. R. Co.	751
Pondville Co. v. Clark	808
Poughkeepsie Bridge Co., Matter of	215

	Page
Poulton v. London Southwestern R. Co.	389
Pratt v. Bacon	1
Pratt v. Pratt, Read & Co.	445
Prefontaine v. Grenier	632
President, etc., of Bank of Michigan v. Niles	309
President & Visitors of Maryland Hospital v. Foreman	321
Process Against Corporations	793
Proctor Coal Co. v. Finley	428
Prouty v. Lake Shore & M. S. R. Co.	789
PROVIDENCE STEAM ENGINE CO. v. HUBBARD	858
Provident Bank & Trust Co. v. Saxon	100
Provident Life & Guaranty Ass'n, In re	836
Provincial Life Assur. Soc., In re	778
PULLMAN v. UPTON	3
Pullman v. Upton	815
Pullman's Palace Car Co. v. Central Transp. Co.	378
QUEEN, THE v. BIRMINGHAM & G. R. Co.	397
Queen, The v. Birmingham & G. R. Co.	402
Queen, The v. Great North of England R. Co.	401
RACCOON RIVER NAV. CO. v. EAGLE	112
RAILROAD CO. v. HOWARD	765
Railroad Co. v. Howard	260, 848
RAILROAD CO. v. STATE	733
Railroad Tax Cases, The	668
Reed v. Home Sav. Bank	394
Rehbein v. Rahr	127
Reid v. Eatonton Mfg. Co.	801
Reid v. Owensboro Sav. Bank & Trust Co.	161
REX v. THE HOSTMEN OF NEWCASTLE	408
Riche v. Ashbury Park R. Co.	305
Roberts v. Owensboro Sav. Bank & Trust Co.	161
Robertson v. Bullions	654
Robinson v. Holbrook	268
ROBINSON v. SMITH	448, 652
Robotham v. Prudential Ins. Co.	265
Rogers v. Danby Universalist Soc.	507
Rosenbaum v. United States Credit System Co.	719
ROTHERHAM ALUM AND CHEMICAL CO., IN RE	196
Rough v. Breitung	25
Rouse v. Merchants' Nat. Bank	774
Russell v. McLellan	3, 703
Ryan v. Martin	101
St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.	331
St. Peter's Roman Catholic Congregation v. Germain	341
San Diego Gas Co. v. Frame	65
San Mateo County v. Southern Pac. R. Co.	58, 668
SARGENT v. FRANKLIN INS. CO.	582
Savings Bank of Rock Hill, Ex parte	763
Savings Trust Co. v. Bear Valley Irr. Co.	341
SAWYER v. HOAG	824
Sawyer v. Methodist Episcopal Society	507
Schenck v. Andrews	822
Schenectady & S. P. R. Co. v. Thatcher	678
Scheuer v. Smith & Co.	698
Schleider v. Dielman	719
Schnittger v. Old Home Consol. Min. Co.	644
School Dist. No. 56 v. St. Joseph Fire & Marine Ins. Co.	683
Schwartz v. State	428
Scott v. Baltimore & O. R. Co.	470
SCOTT v. INSURANCE CO.	448
Scripture v. Francestown Soapstone Co.	583
Seaton v. Grant	541
Security Nat. Bank v. St. Croix Power Co.	309
See v. Heppenheimer	822
SEXTON v. WHEATON	754
Seymour v. Chicago Guaranty Fund Life Soc.	315
SHARPLES v. HARDING	767
Shepaug Voting Trust Cases	440
SHOE CO. v. HOIT	135
Simpson v. Directors of Westminster Palace Hotel Co.	488
SLARK v. HIGHGATE ARCHWAY CO.	242
SLEE v. BLOOM	696
Slocum v. Head	65
Small v. Minneapolis Electro Matrix Co.	236
Smith v. Hurd	499
Smith v. San Francisco & N. P. R. Co.	435
Smith v. Sheeley	84
Smith v. Silver Valley Min. Co.	72
Society of Middlesex Husbandmen & Manufacturers v. Davis	69
Society Perun v. Cleveland	104
Society Perun v. Hay	104
Southern Life Insurance & Trust Co. v. Cole	580

	Page
South Mountain Min. Co., In re	822
Southwestern Slate Co. v. Stephens	139
Southwest Mo. Light Co. v. Joplin	215
Spahr v. Bank	101
Spear v. Bach	580
SPEAR v. GRANT	848
SPERING'S APPEAL	620
SPRING VALLEY WATERWORKS, IN RE	63
State v. Baltimore & O. R. Co.	402
State v. Collectors of Newark	215
State v. Com'rs of Mansfield	215
State v. Ferris	421
State v. Hancock	215
State v. Janesville Water Co.	710
State v. Morris & E. R. Co.	396
State v. Portage City Water Co.	215
State v. President & Directors of Ohio & Miss. R. Co.	402
State v. Southern B. & L. Ass'n	710
State v. Standard Oil Co.	52
State v. Stevens	83
STATE v. STOCKLEY	429
State v. Topeka Water Co.	215
State v. United States Endowment & Trust Co.	706
State v. Western Irrigating Canal Co.	224
State v. Western Irrigating Canal Co.	215
State Board of Agriculture v. Citizens' St. R. Co.	305
State Savings Ass'n of St. Louis v. Kellogg	696
STATE TRUST CO. v. TURNER	768
STEACY v. LITTLE ROCK R. CO.	835
Steinway's Petition, In re	412
Sternbergh v. Brock	466
Stevens v. Rutland & B. R. Co.	497
STICKNEY'S WILL, IN RE	357
Stourbridge Canal Co. v. Wheeley	215
String v. Turnpike Co.	215
Stuart v. Hayden	846
Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank	362
Sturgeon Bay, etc., Co. v. Leatham	215
Sutton's Hospital, In re	216
Swan Land & Cattle Co. v. Frank	848
Swift v. Smith	703
SWIM v. WILSON	584
Taft v. Hartford, etc., R. Co.	466
Talladega Ins. Co. v. Landers	71
Taylor v. Cummings	822
Taylor v. Griswold	423
Telegraph, The v. Loetscher	184
Tempel v. Dodge	615
THOMAS v. DAKIN	5
THOMAS v. RAILROAD CO.	233, 332
THOMPSON v. CANDOR	109
Thornton v. Marginal Freight R. Co.	712
Thrasher v. Pike County R. Co.	112
Tiffin Glass Co. v. Stoehr	719
Tilson v. Warwick Gaslight Co.	197
Timm v. Grand Rapids Brewing Co.	258
Tisdale v. Harris	580
TITCOMB v. UNION MARINE & FIRE INS. CO.	576
TOMKINSON v. RAILROAD CO.	255
TREAT v. INSURANCE CO.	530
Trevor v. Whitworth	278
Troy v. Rutland R. Co. v. Kerr	678
TRUST CO. v. GEILFUSS	776
Trustees of School Dist. No. 3 in Blandford v. Gibbs	74
Turnbull v. Prentiss Lumber Co.	742
Turner v. Grangers' Life & Health Ins. Co.	813
Twin-Lick Oil Co. of West Virginia v. Marbury	641
Ulmer v. Lime Rock R. Co.	30
Union Bank v. Jacobs	236
Union Mut. Fire Ins. Co. v. Keyser	608
United States v. Milwaukee Refrigerator Transit Co.	55
UNITED STATES v. STANFORD	829
United States Electric Power & Light Co. v. State	37
Vance & Kirley v. McNabb Coal, etc., Co.	771
Van Cleve v. Bretelle	822
Venable Bros. v. Southern Granite Co.	715
Venner v. Chicago City R. Co.	418, 682
Venner v. Great Northern R. Co.	557
Vermont Marble Co. v. Declez Granite Co.	826
VERPLANCK v. MERCANTILE INS. CO.	652
Vicksburg & Yazoo City Tel. Co. v. Citizens' Tel. Co.	771
Village of Hyde Park v. Oakwoods Cemetery Ass'n	691
VOSE v. GRANT	848
Wagner Institute v. Philadelphia	665
WALES v. STETSON	661
WALLACE v. CARPENTER CO.	830
Walla Walla Water Co. v. Walla Walla	215
Wallerstein v. Ervin	328

	Page
WARE v. GRAND JUNCTION WATER CO.	504
Warren v. Pim	445
WATER CO. v. HERBERGER	585
Waterhouse v. Jamieson	836
Weatherford, M. W. & N. W. R. Co. v. Granger	199
Weinburgh v. Union St. Ry. Advertising Co.	428
Welland Canal Co. v. Hathaway	96
Welton v. Saffery	820
Western of Canada Oil Lands & Works Co., In re	836
Western Union Tel. Co. v. Burlington & S. W. R. Co.	331
West River Bridge Co. v. Dix	688
West Winsted Sav. Bank & Building Ass'n v. Ford	100
White v. Commercial & Farmers' Bank of Rock Hill	763
WHITE MOUNTAINS R. CO. v. EASTMAN	156
Whitfield v. South Eastern R. Co.	396
Whitney Arms Co. v. Barlow	311
Whittenton Mills v. Upton	264
Wilkinson v. Bertock & Co.	808
WILLIAMS v. CHENEY	102
Williams v. Hewitt	100
Williams v. McKay	852
WILLIAMSON v. KOKOMO, B. & L. F. ASS'N	108
Willmott v. London Road Car Co.	47
Wilmington City R. Co. v. People's R. Co.	665
Wilmington City R. Co. v. Wilmington & B. S. R. Co.	665
Wilson v. Carter Oil Co.	264
Wilson v. Leary	723
Windmuller v. Standard Distilling & Distributing Co.	479
Winter v. Baker	848
Winterfield v. Cream City Brewery Co.	260
WOLF v. RAILROAD CO.	530
WOOD v. DUMMER	275
Wood v. Dummer	848
Woodfork v. Union Bank	678
Woods v. Greensboro Natural Gas Co.	215
Wooten v. Wilmington & W. R. Co.	589
Wragg, In re	822
Wrexham, Mold & Connah's Quay R. Co., In re	373
Wright v. Floyd	532
Wright v. Pipe Line Co.	361
Yeaton v. Bank of Old Dominion	665
Young v. Erie Iron Co.	822
Zabriskie v. Hackensack & N. Y. R. Co.	678
ZABRISKIE v. RAILROAD CO.	366
Zeimer v. C. G. Bretting Mfg. Co.	779
Zinc-Carbonate Co. v. First Nat. Bank	309

CASES ON THE LAW OF CORPORATIONS

CHAPTER I

CHARACTERISTIC FEATURES OF A CORPORATION

SECTION 1.—THE CORPORATION AS DISTINGUISHED FROM OTHER FORMS OF BUSINESS ASSOCIATION

PRATT v. BACON et al.

(Supreme Court of Massachusetts, 1830. 10 Pick. 123.)

Bill in equity by the plaintiff, a stockholder in the Merino Wool Factory Company, against the defendants, also stockholders, alleging that the corporation has ceased to carry on business; that the defendants have unjustly possessed themselves of all the property of the corporation, and sold the same in the name of the corporation and received the proceeds; that the defendants refuse to account, etc. Prayer for account and for general relief. Plea filed to the jurisdiction of the Court as a court of equity.[1]

PER CURIAM. The Court are all of opinion, that this bill cannot be sustained. It is, in effect, a bill by one corporator against other corporators, for an account of the corporate property. The plaintiff considers the act of incorporation as still in force, and the corporation as still subsisting, and proceeds upon the ground, that as between each other, corporators are partners, joint-tenants or tenants in common, within the meaning of the statute, conferring upon this Court equity jurisdiction in controversies between parties standing in those relations. The equity jurisdiction of this Court is strictly limited, in regard to the subject matter of it, though ample and entire, as to every incidental question, and every remedy and course of proceeding, falling within the scope of such subject matter. It has often been decided, that the Court does not take equity jurisdiction, except where it is given by statute, either in express terms or by necessary implica-

[1] Statement of facts substituted.

tion, and that it will not be assumed, by analogy or equity of construction.[2]

Similarity between corp.s and ptnr.

There is certainly some resemblance between a corporation and a partnership, inasmuch as each may consist of two or more persons associated together, and acting in concert, for the promotion of some private or public object. But the difference between the relative rights and duties, the legal qualities and characteristics of the members of a manufacturing corporation, and copartners and tenants in common, is obvious and strongly marked. A corporation is an ideal body, subsisting only in contemplation of law, which may be composed of members constantly changing, which is deemed, for useful purposes, to have an existence independently of that of all the members of which it is composed, to be capable of perpetual succession, and of acquiring, holding and conveying property. Its real and personal property is deemed to be vested in the corporation and not in the individuals composing it; and these have no other interest in it, or control over it, than the qualified ones, of electing officers, and receiving dividends and profits in the manner provided by the act of incorporation, or the votes and by-laws, which may be made pursuant to the powers conferred by it. They cannot bind their associates, or the corporation, either in any personal obligation, or executory contract, nor alienate, pledge or otherwise affect the corporate property, by any sale, mortgage, contract or other personal act. They may change their relation to the corporation, at any time, by a sale of their shares; and such sale is not deemed to be a transfer of any legal interest in the corporate property, but of the qualified, beneficial interest before mentioned. By a like transfer of shares, strangers may become members without the consent of the corporation, unless when some restraint is imposed upon the general right by a by-law, and such by-law, by imposing a particular limitation, would itself imply the existence of the general rule. It is true, that at the time this corporation was established, by force of a particular provision of law, the individual members were made conditionally liable for the debts of the corporation; but as the law then stood, this liability ceased, by their ceasing to be members, by a sale of their shares, even for debts and obligations incurred whilst they were members, contrary to the well known rule of law in relation to partners. But further, this liability was several and not joint; it was provisional and collateral, in the nature of a guaranty, not the debt or obligation of the corporators themselves personally; it resulted from the positive provision of the statute, and not the common law obligation of a contract deemed to be made by them, and growing out of the relation in which they were placed. In all these respects the members of a manufacturing corporation, in their legal relations to each

Difference

Property vested in corporation

Interest of members a shareholders

What members cannot do

How rel. ship changed & effect

Li. bility of members

several liability

[2] See Galvin v. Shaw, 12 Me. 454 (1835); Given v. Simpson, 5 Greenl. (Me.) 303 (1828).

other, differ essentially and radically from partners, joint-tenants and tenants in common; and however beneficial it might be for the members of corporations, now so extensively multiplied through the Commonwealth, to have the aid of a court of equity, in adjusting the multifarious and perplexing controversies, which are likely to arise out of this relation, still we are all of opinion, that by no reasonable construction of the statute relied upon, can their case be brought within the equity jurisdiction given by that statute.[a]

MERCHANTS' NAT. BANK v. WEHRMANN (1906) 202 U. S. 295, 300, 26 Sup. Ct. 613, 614, 50 L. Ed. 1036, Holmes, J.: * * * "We may assume further, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly the same sense as does a share in the other. In either case the members could divide the assets after paying the debts. But from the point of view of the law there is a very important difference. The corporation is legally distinct from its members, and its debts are not their debts. Therefore when a paid-up share in a corporation is taken, no liability is assumed, apart from statute, but simply a right equal in value to a corresponding share in the assets and good will of the concern after its debts are paid. If the right is worth something it is a proper security, and if it is worth nothing no harm is done. It is true that a statute may add a liability, but when, as usual, this is limited to the par value of the stock, it has not been considered to affect the nature of the share so fundamentally as to prevent a national bank from taking it in pledge, with qualifications, as it might take land or bonds.

"But to take a share by transfer on the books means to become a member of the concern. The person who appears on the books of the corporation as the stockholder is the stockholder as between him and the corporation, and his rights with regard to the corporate property are incident to his position as such. National Bank v. Case, 99 U. S. 628, 631 [25 L. Ed. 448]; Pullman v. Upton, 96 U. S. 328 [24 L. Ed. 818]. This does not matter, or matters less, in the case of a corporation, for the reasons which we have stated. But when a similar transfer is made of a share in a partnership, it means that the transferee at once becomes a member of the firm and goes into its business with an unlimited personal liability, in short, does precisely what a national bank has no authority to do. This the Supreme Court of Ohio rightly held beyond the powers of the bank."

[a] Russell v. McLellan, 14 Pick. (Mass.) 63 (1833).

PEOPLE ex rel. NATIONAL EXP. CO. v. COLEMAN et al., Tax Com'rs.

(Court of Appeals of New York, 1892. 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.)

Proceedings on the relation of Lock W. Winchester, as treasurer of the National Express Company, to review the action of the tax commissioners in taxing the company on its capital stock as a corporation. From a judgment of the general term, affirming a judgment of the special term vacating the assessment, the commissioners appeal.

FINCH, J. The relator was taxed upon its capital, on the ground that it had become a corporation, within the meaning of the provision of the Revised Statutes which enacts that "all moneyed or stock corporations deriving an income or profit from their capital, or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." 1 Rev. St. pt. 1, c. 13, tit. 4, § 1. The company was formed as a joint-stock company or association, in 1853, by a written agreement of eight individuals with each other, the whole force and effect of which, in constituting and creating the organization, rested upon the common-law rights of the individuals, and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement, and dependent in no respect upon the grant or authority of the state. It was entered into under no statutory license or permission, neither accepting nor designed to accept any franchise from the sovereign, but founded wholly upon the individual rights of the associates to join their capital and enterprise in a relation similar to that of a partnership. A few years earlier the Legislature had explicitly recognized the existence and validity of such organizations, founded upon contract, and evolved from the common-law rights of the citizens. Laws 1849, c. 258. That act provided that any joint-stock company or association which consisted of seven or more members might sue or be sued in the name of its president or treasurer, and with the same force and effect, so far as the joint property and rights were concerned, as if the suit should be prosecuted in the names of the associates; but the act explicitly disclaimed any purpose of converting the joint-stock associations recognized as existing into corporations by a section prohibiting any such construction. Section 5. In 1851 the act was amended in its form and application, but in no respect material to the present inquiry. There is no doubt, therefore, that, when the company was formed and went into operation, the law recognized a distinction and substantial difference between joint-stock companies and corporations, and never confused one with the other; and that the existing statute which taxed the capital of corporations had no reference to or operation upon joint-stock companies or associations.

But two things have since occurred. The legislature, while stead-

ily preserving the distinction of names, has, with equal persistence, confused the things, by obliterating substantial and characteristic marks of difference; until it is now claimed that the joint-stock associations have grown into and become corporations by force of the continued bestowal upon them of corporate attributes. It is said, and very probably correctly said, that the legislature may create a corporation without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes, and the cases of banking associations are referred to as instances of actual occurrence. Thomas v. Dakin, 22 Wend. 9; Bank v. Watertown, 25 Wend. 686; People v. Niagara, 4 Hill, 20. It is added that such result may happen even without the legislative intent, and because the gift of corporate powers and attributes is tantamount to a corporate creation. It is then asserted that a series of statutes, beginning with the act of 1849, has ended in the gift to joint-stock associations of every essential attribute possessed by and characteristic of corporations (Laws 1853, c. 53; Laws 1854, c. 245; Laws 1867, c. 289;) that the lines of distinction between the two, however far apart in the beginning, have steadily converged, until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated; and no reason remains why joint-stock associations should not be, in all respects, treated and regarded as corporations.

Some of this contention is true. The case of People v. Wemple, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303, shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations, until the difference, if there be one, is obscure, elusive, and difficult to see and describe. And yet the truth remains that all along the line of legislation the distinctive names have been retained as indicative and representative of a difference in the organizations themselves. As recently as the acts of 1880 and 1881, which formed the subject of consideration in the Wemple Case, the legislature, dealing with the subject of taxation, and desiring to tax business and franchises, imposed the liability upon "every corporation, joint-stock company, or association whatever, now or hereafter incorporated or organized under any law of this state." It is significant that the words "or organized" were inserted by amendment, and evidently for the understood reason that joint-stock companies could not properly be said to be "incorporated," but might be correctly described as "organized" under the laws of the state. This persistent distinction in the language of the statutes I should not be inclined to disregard or treat as of no practical consequence, when seeking to arrive at the true intent and proper construction of the statute, even if I were unable to discover any practical or substantial difference between the two classes of organizations upon which it could rest or out of which it grew;

for the distinction so sedulously and persistently observed would strongly indicate the legislative intent, and so the correct construction.

But I think there was an original and inherent difference between the corporate and joint-stock companies, known to our law, which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical, and well supported by authority. It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in Supervisors of Niagara v. People, 7 Hill, 512, and in Gifford v. Livingston, 2 Denio, 380, by the statement that the corporators lost their individuality, and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined, on behalf of the respondents, to be "an artificial person created by the sovereign from natural persons, and in which artificial person the natural persons of which it is composed become merged and nonexistent." I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted, if it successfully bears some sufficient test. In putting it on trial, we may take the nature of the individual liability of the corporators on the one hand, and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character.

It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing by the intervention of an express command the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are of course new statutory liabilities which never, at common law, rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability, as

we had occasion to show in Rogers v. Decker, 131 N. Y. 490, 30 N. E. 571, but is retained by force of the express command of the statute, and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liability arises after the usual remedies against the corporation have been exhausted. But, where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common-law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities, or a specific retention of old ones from the destruction which would otherwise follow.

Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Those debts are their debts, for which they must answer. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. The statute of 1853 did interfere with it. That act required, in the first instance, a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that act was modal, and determined the procedure. It suspended the common-law right, but recognized its existence. We so held in Witherhead v. Allen, 4 Abb. Dec. 628, and at the same time said that the associations were not corporations, but mere partnership concerns. Even that mode of procedure has been modified by the Code (sections 1922, 1923) so that the creditor, at his option, may sue the associates without first bringing his action against the president or treasurer. These last and quite recent enactments show that the legislative intent is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common-law liability of associates, and not to substitute for it that of corporators; and, preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one, or destroy the boundaries which separate them. That intent, once clearly ascertained, determines the construction to be adopted, and may be the only reliable test in view of the power of the state to clothe one organization with all the attributes of the other. The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand, corporations have been created with positive provisions retaining more or less the individual liability of the members, and on the other, the joint-stock companies have been clothed with most of the corporate attributes; but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the

original difference of character and quality to disclose a clear intent not to merge the two.

We may thus see upon what the legislative intent to preserve them as separate and distinct is founded, and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new, or retention of the old, liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other the common-law liability remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it. The debt of the corporation is its debt, and not that of its members; the debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the liability of its corporators; the creation of the stock company leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of individuals; the other, from the sovereignty of the state. The two are alike, but not the same. More or less they crowd upon and overlap each other, but without losing their identity; and so, while we cannot say that the joint-stock company is a corporation, we can say, as we did say, in Van Aernam v. Bleistein, 102 N. Y. 360, 7 N. E. 537, that a joint-stock company is a partnership, with some of the powers of a corporation. Beyond that we do not think it is our duty to go. The order should be affirmed, with costs. All concur.[4]

EDWARDS v. WARREN LINOLINE & GASOLINE WORKS, Limited.

(Supreme Judicial Court of Massachusetts, 1897. 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791.)

Action by one Edwards against the Warren Linoline & Gasoline Works, Limited, in which the Walworth Manufacturing Company was summoned as trustee. From a judgment discharging the trustee, and dismissing the action, plaintiff appeals. Affirmed.

LATHROP, J.[5] It is conceded by the plaintiff that as the jurisdiction of the court depends upon charging the Walworth Manufacturing Company as trustee, inasmuch as there was no service upon the principal defendant, the action was properly dismissed upon discharging the trustee. The question, then, is whether the trustee was properly discharged, and this depends upon whether the principal defendant, an association formed under the laws of the state of Pennsylvania, is a partnership or a corporation.

[4] Accord: In re Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476 (1902). Compare In re Pittsburg, 204 Pa. 432, 54 Atl. 316 (1902).

[5] A part of the opinion is omitted.

The trustee's answers to interrogatories refer to Brightly's Purd. Dig. (12th Ed.) 1086–1088, and to the cases of Eliot v. Himrod, 108 Pa. 569, and Sheble v. Strong, 128 Pa. 315, 18 Atl. 397, as containing the law relative to the statement in the answer that the principal defendant was a partnership, and not a corporation. From the Digest it appears that such an association is styled a "partnership association," and not a corporation. By the terms of the various acts which have been passed upon the subject, such an association may be formed by three or more persons. The capital is alone to be liable for the debts. There is no personal liability of the members, except to the extent of any unpaid subscription, if certain provisions of the act are complied with. "Interests in such partnership associations" are declared to be personal estate, and are transferable, under such rules and regulations as shall from time to time be prescribed; but, if there are no such rules and regulations, the transferee of any interest in any such association is not entitled to any participation in the subsequent business of the association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. The business is to be conducted by a board of managers. The duration of the association may be fixed by the articles of association, but is not to exceed 20 years.

Power to adopt and use a common seal is given in case the association has occasion to execute a deed of conveyance or bonds and mortgages. Land sold to the association, or by it, is required to be conveyed in the name of the association. It is further provided: "Said association shall sue and be sued in their association name; and, when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association."

In Eliot v. Himrod, 108 Pa. 569, 580, it is said by Mr. Justice Trunkey, in delivering the opinion of the court: "The formation of a limited partnership association is materially different from the creation of a corporation. Such association is treated in the statute as a partnership, which, upon the performance of certain acts, shall possess specified rights and immunities. In contemplation that the association may consist of many members, for convenience it is clothed with many of the features and powers of a corporation, such as the right to sue and be sued, grant and receive, in the association name. But no man can purchase the interest of a member, and participate in the subsequent business, unless by a vote of a majority of the members in number and value of their interests. No charter is granted to the persons who record their statement." Sheble v. Strong, 128 Pa. 318, 18 Atl. 397, is to the same effect.

If the question presented were an open one in this commonwealth, it might well be held that such an association could be considered to

have so many of the characteristics of a corporation that it might be treated as one. At common law, a joint-stock company formed for business purposes is considered in this commonwealth merely as a partnership. Tappan v. Bailey, 4 Metc. 529; Tyrrell v. Washburn, 6 Allen, 466. The same rule has been applied to joint-stock associations formed under the laws of the state of New York, which do not differ, in any essential respect, from the laws of Pennsylvania. Taft v. Ward, 106 Mass. 518, 111 Mass. 518; Bodwell v. Eastman, 106 Mass. 526; Gott v. Dinsmore, 111 Mass. 45, 51; Railroad v. Pearson, 128 Mass. 445. See, also, Frost v. Walker, 60 Me. 468; Dinsmore v. Railroad, 32 Leg. Int. 388, 11 Phila. 483, and Fed. Cas. No. 3,921.

In Taft v. Ward, 106 Mass. 518, 524, speaking of the New York statutes, it was said by Chief Justice Chapman: "These statutes provide, in substance, that any association consisting of seven or more shareholders or associates may sue and be sued in the name of the president or treasurer; that in such suit a judgment may be rendered against the company; and until an execution is issued against the company and returned unsatisfied, no action shall be maintained against individuals. These statutes seem to apply to all co-partnerships consisting of seven or more members. The members of such companies are authorized to hold their interests in shares, which are assignable like shares of stock in a corporation, and the action against the members is regarded as supplementary to the action against the company. Waterbury v. Express Co., 50 Barb. (N. Y.) 157; Robbins v. Wells, 1 Rob. (N. Y.) 666. So far as these statutes relate to the procedure in courts for the recovery of debts, they are limited to the state of New York; for each state adopts its own forms of remedy. Story, Confl. Laws, §§ 556–558. The plaintiff could not in this commonwealth bring an action against the president or secretary, and obtain a judgment against the company by its name; nor could he bring an action against the members, or any of them, as a supplement to such an action. In order to do so, we must hold that the statutes of New York prescribing forms of action are in force here. In this commonwealth, such a company is a mere co-partnership."

Transferability of shares does not make an assn corporation

There is nothing inconsistent with an association being a partnership that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution of the partnership. Phillips v. Blatchford, 137 Mass. 510. See, also, Hoadley v. County Com'rs, 105 Mass. 519; Gleason v. McKay, 134 Mass. 419.

The case mostly relied on by the plaintiff is Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029, which was taken to the supreme court of the United States on a writ of error from this court. See Oliver v. Insurance Co., 100 Mass. 531. It was a bill in equity, filed by the treasurer of the commonwealth, under St. 1862, c. 224, § 11, to restrain the defendant from prosecuting its business, until the tax assessed upon it by section 2 of the statute had been paid.

This section provided that "each fire, marine, and fire and marine insurance company incorporated or associated under the laws of any government or state, other than one of the United States," should annually pay a certain tax. The defendant was an English company, formed for the business of insurance, and organized under a deed of settlement. Its property was divided into transferable shares. It had power to sue and be sued by the name of its chairman, and a suit did not abate by reason of the death of such officer. The company could sue its own members, and be sued by them. Execution on any judgment recovered against the company could be issued against any proprietor. The statute under which it was formed, and subsequent statutes, declared that it should not be deemed to be incorporated. The company was composed in part of British subjects, and in part of citizens of the state of New York.

This court, after stating that it was not a pure corporation nor a pure partnership, but was an association intermediate between corporations known to the common law and ordinary partnerships, and was so far clothed with corporate powers that it might be treated, for the purposes of taxation, as an artificial body, proceeded to say: "We think the defendants are an association of the kind to which the statute of 1862 was expressly intended to apply, as well as to bodies wholly corporate in their character; and that, being permitted by the comity of our laws to exercise their functions within this commonwealth, they can claim no exemption from regulations appropriate to their collective action on account of the citizenship or nationality of their individual members."

In the supreme court of the United States the decree of this court was affirmed, on the ground that the company was a foreign corporation; but Mr. Justice Bradley, while agreeing in the result, differed on the question whether the company was a corporation. He was of opinion that it was one of those special partnerships called "joint-stock companies," and that it could not sue or be sued in this country without legislative aid. This view of Mr. Justice Bradley is in accord with the view of this court, and we are not aware that the view taken by the supreme court of the United States has been followed in this commonwealth. The decisions which we have already cited show that a foreign joint-stock company is considered as an association or partnership, and not as a corporation. * * *

Unless the principal defendant can be considered a corporation, it cannot be sued here under the name which the laws of Pennsylvania authorize it to use. Such laws have no extraterritorial force or effect. The trustee, therefore, was properly discharged. In the opinion of a majority of the court, the order discharging the trustee, and dismissing the action, must be affirmed.

HIBBS v. BROWN et al.

(Court of Appeals of New York, 1907. 190 N. Y. 167, 82 N. E. 1108.)

Action by William B. Hibbs against Alexander Brown and others. From an order of the Appellate Division (112 App. Div. 214, 98 N. Y. Supp. 353), reversing a judgment and order of the Appellate Term, affirming a judgment of the Municipal Court for plaintiff and ordering a new trial, he appeals.

This is an action to replevy some coupons originally attached to a bond issued by the Adams Express Company, and appellant's right to succeed turns on the question whether said bond and coupons were negotiable and acquired by respondents in due course for value. The controlling facts may be summarized as follows:

In January, 1902, the appellant owned a certain bond of the Adams Express Company, to which were attached interest coupons for $20 each, then unmatured. The bond was stolen, and on April 23, 1902, with the coupons still attached, was presented by an unknown individual at the office of respondents, who were conducting a brokerage business at Baltimore, Md., with a request that they buy it. This being declined, such person then requested that they sell it for him, and they thereupon wired Brown Bros. in New York to sell it, which was done on the floor of the Stock Exchange to brokers acting for an undisclosed principal, at the market price. Brown Bros. then notified the respondents that the sale had been made, and the latter accepted the bond and coupons, and paid the vendor thereof in cash the entire proceeds of the sale which they were to receive from Brown Bros. The respondents then forwarded the bond and coupons to Brown Bros. in New York, and they were delivered through the brokers who purchased the same to Erico Bros., the clients for whom they were purchased, and who it is conceded were innocent purchasers for full value before maturity.

The appellant did not discover the loss of the bond and coupons until July, 1902, and then he notified every bank and trust company in Washington, and also the express company and the Mercantile Trust Company of New York, the trustee at whose office the coupons were payable, to stop payment of the latter, and to identify any person presenting any of them for payment. Erico Bros. presented the coupons for September, 1902, and March, 1903, for payment, and the same were paid notwithstanding the previous notice. In March, 1904, Erico Bros. also presented for payment to the trust company the coupons for September, 1903, and March, 1904, and payment was refused. They then through their brokers through whom they originally made the purchase demanded of the brokers who had sold them for Brown Bros. that they take back the bond and unpaid coupons, and refund the purchase price. Brown Bros. made a similar claim on the respondents, who, by purchasing and delivering another

bond of the same issue, settled the claim and received back the bond and unpaid coupons. When the appellant ascertained these facts, he demanded the bond and coupons on the ground that they had been stolen from him; and, on defendants' refusal to deliver, he brought this action to recover three of the coupons which had been detached from the bond.

The Adams Express Company, which, as before stated, issued the bond, is an unincorporated voluntary association or joint-stock association organized under the laws of this state for the purpose of carrying on an express business, and having a president and other officers, and issuing certificates of stock which represent and whereby are transferred the rights of the respective shareholders. The bond was issued by the express company in and under its association name, and was one of an issue of $12,000,000, secured by a certain trust indenture conveying and pledging for its payment a large amount of securities and property. It bore interest coupons of the ordinary form payable to bearer, and, except for two clauses to be specifically referred to, may be assumed to have been in the usual form of a corporation negotiable bond payable to bearer or the registered holder. Of the clauses to be particularly noted, one which is especially important provides that "no person or future shareholder, officer, manager or trustee of the express company shall be personally liable as partner or otherwise in respect to this bond or the coupons pertaining thereto, but the same shall be payable solely out of the assets assigned and transferred to the said trust company or out of other assets of the express company." The other clause refers to the deed of trust for a statement of the rights of the bondholders and of the securities and property securing the payment of the bonds. Amongst the provisions of said trust indenture thus referred to and made controlling upon the bondholders are several relating to enforcement of the trust and collection of the bonds which are claimed to confer upon a certain proportion of the bondholders the right to waive default in and postpone payment of interest coupons.

HISCOCK, J.* * * * And thus we come at once to the last proposition, and to the interesting and important question upon which we differ, whether the bonds, of which the one here involved is one, were rendered nonnegotiable because of the clause already quoted exempting members of the Adams Express Company from that personal liability thereon which would ordinarily attach to the individual members of a joint-stock association. * * *

The decisions which I have quoted state the rule that a negotiable instrument may not be made payable out of a particular fund as the equivalent of the one that it must be "drawn on the general credit of the drawer"; and so, if we fairly can say that, notwithstanding the exemption, the maker of the bonds did pledge its general credit, then it

*A part of the opinion is omitted.

will follow that there has not been that limitation of promise of payment to a particular fund which is prohibited by the statute.

Was the general credit of the obligor pledged? The Adams Express Company was the maker of the bonds. They were issued by it in its artificial, corporate-appearing name, under its common seal, by its authorized executive officers and for its benefit. They expressed the general promise and obligation of the company which thus issued them, and were a claim against it, upon which, as we shall see hereafter, judgment might be obtained or a receiver be appointed of it, and satisfaction obtained out of any or all of its joint business, well-understood assets and property, and which we know aggregated many millions of dollars. Payment was not limited to the pledged securities or to any other part or parcel of the property of the association which made the bonds, but was a charge against the whole thereof. Thus far, therefore, they were entirely similar to the familiar bonds issued by an ordinary corporation which are general claims against it, and which are concededly negotiable; but here it is that we come against the contention that this view of the character of the bonds, however practical and desirable, cannot prevail; that the exemption of the personal liability of the individual members of the association after all works a limitation upon the pledging of the general credit of the company which issued the bonds, and turns all of its assets, from which their payment may be enforced, into a special, limited fund.

joint stock in a partnership

As the foundation for this contention much care has been devoted to pointing out the difference between a joint-stock association and a corporation, and to emphasizing the fact that the former is in effect a partnership, and that the individual liability of its members is just as essential a characteristic as it is in the case of a partnership, and that, therefore, it may not be eliminated without materially affecting the contract of the association. Of course, there can be no doubt that a joint-stock association differs from a corporation, or that in its original conception and ultimate analysis it is like a partnership in respect to the individual liability of its members; but, upon the other hand, so many of the attributes and characteristics of a corporation have been impressed upon the modern joint-stock association that in my opinion, for the purposes of the question now before us, we are amply justified in regarding simply the joint, quasi corporate entity, and in saying that an obligation issued in its name upon its general credit, and binding all of its assets, complies with the requirements for a negotiable instrument, even though the practically unimportant individual liability of members is excluded.

We may briefly refer to some of these characteristics which, as I think, have led both courts and laymen to regard joint-stock associations largely as corporate creations, and in ordinary business dealings quite to ignore the feature of individual membership and liability, even though it does exist. They are, like corporations, organized under and regulated by statutes. Laws 1894, p. 412, c. 235. They

Similarity with a corporation

have, and transact business under, an artificial name. Their capital and ownership is represented by shares of stock transferable at will, and their existence is not dissolved or affected by the death of or transfer of interest by members. They have regular officers in whose names actions may be commenced in behalf of and against the association, and, upon a judgment rendered in the latter case, execution may be issued only against property belonging to the association or to all of its members jointly. Formerly action could not be brought against the individual members of the association until after judgment and execution unsatisfied against the association. Now, although an action may be brought in the first instance against the members, still, if the claimant elects to bring suit against the association, he must then, as formerly, proceed to judgment and execution unsatisfied before instituting other suit against the members. And, as illustrating the complete and separate existence of the association as between it and the individual members, suit may be brought by it against such members. Code, §§ 1919–1924. * * *

Now, while it is true that these statutes conferring upon joint-stock associations the attributes of corporations, and the opinions discussing the similitude of the former to the latter do not destroy the element of individual liability, they do irresistibly force upon us appreciation of the fact that a great association like the Adams Express Company is very unlike an ordinary copartnership, and that it has assumed for ordinary, practical purposes in its business and contractual relations the features and characteristics of a corporate creation, whereby the joint aggregate entity has been made prominent, and the individual units composing it have been overshadowed and obscured. Amongst other things, as we have seen, this organization in its aggregate capacity and under its artificial name which bears no relation to the identity of its members may not only hold property, transact business, and make contracts, but, what is especially pertinent in this controversy, those contracts may be enforced by proceedings against it which are entirely independent of any liability of individual members. In short, I do not think that we should transgress any proper limits, if we assumed that the public in dealing with the present bonds did so solely upon the faith and credit of the association, the entity which issued them, and without knowledge or thought of the individuals who composed it or their financial responsibility.

Under such circumstances, we ought not to sacrifice substance to form and destroy the negotiable character of the bonds because of the exemption of individual liability, unless we are compelled to, either by some controlling principle or authority, and, as I believe, there is neither which commands such a course. * * * The order appealed from should be affirmed, and judgment absolute rendered against appellant upon his stipulation, with costs.

O'BRIEN, J.[1] * * * The only question is the case as to which there is any serious dispute is, as I conceive, whether the clause on the face of the bonds, which provides that "no present or future shareholder, officer, manager or trustee of the express company shall be personally liable as partner or otherwise in respect of these bonds or the coupons appertaining thereto," deprives them of the character of negotiable paper. The contention of the plaintiff is that this clause destroys the negotiable quality of the bonds, though payable to the bearer or holder. This clause contains also the statement that the bonds "shall be paid solely out of the assets assigned and transferred to the said trust company or out of the other assets of the express company." So that all the property of the company issuing the bonds was and is available to the holders as the source of payment and satisfaction thereof. I do not think that the obligations of a joint-stock company payable to bearer are rendered nonnegotiable from the fact that the paper upon its face contains a clause which exempts the shareholders and officers from liability so long as the general assets of the company are pledged for payment.

But this is the disputed question in the case, and the contrary view is supported by an argument which rests mainly, if not entirely, upon the proposition that joint-stock associations are partnerships, and that the obligations in question are the obligations of the individual shareholders, and that they are liable upon them, jointly and severally, the same as partners. Stating the argument in another way, it comes to this: The bonds in this case are the bonds of a partnership, made in the name of the firm, and, though containing a promise to pay the bearer or holder a specified sum of money in the future upon a day certain, yet the promise is coupled with a condition that none of the partners shall ever be held liable. If the premises upon which the argument is based are correct, it would, I admit, be difficult to resist the conclusion, unless, indeed, it could be held that the conditions might be rejected as utterly inconsistent with and repugnant to the promise, and therefore void. Adopting the theory that the bonds are the obligations of the shareholders as partners, the repugnancy is quite obvious. But I do not think that the bonds in question are in any proper or legal sense partnership obligations made by the shareholders as partners. Primarily the promise to pay the bearer or holder is not the promise of the shareholders, but of the legal entity represented by the express company as such.

A joint-stock company, whatever else may be said about it, is certainly for most, if not all practical, purposes, a legal entity, capable in law of acting and assuming legal obligations quite independent of the shareholders. The idea that these companies occupy some undefined and undefinable ground midway between a partnership and a corporation has practically faded away, and cannot be applied to the ques-

[1] A part of the opinion is omitted.

tion with which we are now concerned. It is not very important to inquire what they were in their origin, but rather what they are now, or at least were when the bonds in question were issued and sold to the public. It seems to be conceded or assumed that, if the express company, at the time of issuing the bonds, had been incorporated by filing the usual certificate for that purpose, the clause exempting the shareholders from liability would not affect their negotiable character. It remains only to consider what sound distinction, if any, can be made between the $12,000,000 of bonds issued by the express company and the other untold millions of other bonds issued by corporations. They are all negotiable in form; that is to say, payable to order or bearer, as the case may be. Assuming that the shareholders of a corporation are or may be liable for the corporate debts, and that the clause referred to would not affect the negotiable quality of its paper, what reason is there for holding that the clause destroys the negotiable quality of the bonds in question? The proposition that in the one case the bonds import a promise to pay by a corporate body, and in the other the promise of individuals as partners or as a partnership firm, does not seem to me to be reasonable or tenable. The argument in support of that theory would seem to be somewhat strained.

The general rules of law that govern partnerships have very little application to joint-stock companies, at least so far as concerns the question now under consideration. The principle of agency which enables one partner to bind all his associates, as well as the firm, has no application to such companies. The death of one or more of the members of the company does not work a dissolution. The doctrine of survivorship, so important as between partners, does not exist as to such companies, and so it would be difficult to state a single general rule of partnership law that in its full extent could be applied to such companies. On the other hand, there are very few of the legal principles that apply to corporations that do not apply in some form to these companies. They are taxed and perpetuated through the shares of stock as corporations are. They are entitled to assume an artificial name, to sue, and are subject to be sued. They may use a common seal, and through the shares of stock they have perpetual life even in a larger sense than corporations have. Their general powers and duties to the public are practically the same and regulated in the same way as corporations. I need not pursue the comparison any further, nor enlarge upon it, since the learned opinion of my associate, Judge HISCOCK, who has referred to the various judicial views on the subject, pro and con, fully covers that feature of the case.

It is very true that the shareholders of such companies are liable ultimately for the company's obligations, but that does not make such companies partnerships in the sense that their obligations are the contracts or promises of the shareholders. The shareholders of corporations are or may be liable in the same way, but such liability is not, of

course, that of partners. The statutes of this state prescribing the method of procedure in suits by and against joint-stock companies (Code Civ. Proc. §§ 1919–1924) do not qualify what has been stated concerning the legal nature of such companies. They embody the distinct idea that the liability of the shareholders is not primary, but secondary, the same as in case of corporations; and, even if these statutes had never been enacted, it is quite likely that the Adams Express Company could, in that artificial name, sue and be sued in the same manner as a corporation, since the state Constitution (article 8, § 3), while enacting that corporations have the right to sue and are subject to be sued the same as natural persons, defines joint-stock companies having any of the powers and privileges not possessed by individuals or partnerships as corporations within the meaning of that section. The main purpose of these provisions of the Code would seem to be the enactment of a mode of procedure which would enable creditors of the company, or parties having a cause of action against it, to exhaust all legal remedies against the company as a legal entity before resorting to the personal liability of the shareholders analogous to similar rules applicable to corporations. It is, I think, very difficult to avoid the conclusion that these companies at this day and in this state possess substantially and practically all the attributes of corporations, and still more difficult to assign any sound reason for any distinction to be made between the negotiable character of the bonds of each when made payable to bearer. These companies are for all practical purposes quasi corporations, and it seems to me are clearly such so far as concerns the negotiable character of its commercial paper or promise to pay a specific sum of money to bearer upon a day certain.[8] * * *

GRAY and HAIGHT, JJ., concur with HISCOCK, J. CULLEN, C. J., concurs in result in memorandum. WERNER, J., reads opinion. Ordered accordingly.

SECTION 2.—THE CORPORATION AS DISTINGUISHED FROM ITS STOCKHOLDERS

BUTTON v. HOFFMAN.

(Supreme Court of Wisconsin, 1884. 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131.)

ORTON, J. This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer. In his instructions to the jury the learned judge of the circuit court said: "I

[8] The concurring opinions of Cullen, C. J., and Edward T. Bartlett and Werner, JJ., are omitted.

think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural person who procured its creation, and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged into the corporate identity. Ang. & A. Corp. §§ 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. Id. § 557. The corporation is the trustee for the management of the property, and the stockholders are the mere cestui que trust. Gray v. Portland Bank, 3 Mass. 365; Eidman v. Bowman, 4 Amer. Corp. Cas. 350.

The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. Ang. & A. Corp. § 191; Pope v. Brandon, 2 Stew. (Ala.) 401; Whitwell v. Warner, 20 Vt. 444. The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. Bradley v. Holdsworth, 3

Mees. & W. 422; Waltham Bank v. Waltham, 10 Metc. (Mass.) 334; Tippets v. Walker, 4 Mass. 595. The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. Ang. & A. Corp. §§ 160, 190, 557; Hyatt v. Allen, 4 Amer. Corp. Cas. 624. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. Wilde v. Jenkins, 4 Paige (N. Y.) 481. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the sole stockholder. Ang. & A. Corp. § 779a.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not, therefore, own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property, and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and, at the same time, it would belong to the corporation. One stockholder owning the whole capital stock could, of course, do what several stockholders could lawfully do.

It is said in City of Utica v. Churchill, 33 N. Y. 161, "the interest of a stockholder is of a collateral nature, and is not the interest of an owner"; and in Hyatt v. Allen, supra, that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In Railroad Co. v. Railroad Co., 23 Minn. 359, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interest in its rights, property, and immunities. In Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In Bartlett v. Brickett, 14 Allen (Mass.) 62, an action of replevin was brought by A., B., and C., as the "trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A., B., and C., Trustees as aforesaid," be-

came bound, and the officer, in his return, certified that he had taken a bond "from the within named A., B., and C.," and the property was receipted by "A., B., & C., plaintiffs." It was held that the action was not by the corporation, as it should have been, and judgment was rendered for the defendant. It is said in Van Allen v. Assessors, 3 Wall. 584, 18 L. Ed. 229, "the corporation is the legal owner of all the property of the bank, both real and personal." In Wilde v. Jenkins, supra, where a copartnership bought all the property and effects, together with the franchises, of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In Mickles v. Bank, 11 Paige (N. Y.) 118, it was held that, although a corporation was deemed to have surrendered its charter for non-user, it was not dissolved, and would not until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In Bennett v. American Art Union, 5 Sandf. (N. Y.) 614, it was held that, "as a general rule, the whole title, legal and equitable, (to its property,) is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of complainant, as a shareholder in the art-union, for an injunction against a certain disposition of its property, was denied, because it had no interest in it. See, also, Goodwin v. Hardy, 57 Me. 143.

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of the property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. Timp v. Dockham, 32 Wis. 146; Sensenbrenner v. Mathews, 48 Wis. 250, 3 N. W. 599. In analogy to the above principle it was held in Murphy v. Hanrahan, 50 Wis. 485, 7 N. W. 436, that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would entitle them to sue the maker upon it, because the title to it was in the administrator, and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy.

The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

HALL'S SAFE CO. v. HERRING-HALL-MARVIN SAFE CO.

(Circuit Court of Appeals, Sixth Circuit, 1906. 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. [N. S.] 1182.)

Bill to restrain the defendants, the Hall's Safe Company, E. C. and W. H. Hall, et al., from carrying on the business of manufacturing or selling fireproof safes or vaults under the name of the Hall's Safe Company, or any other name calculated to deceive the public in the belief that the Hall's Safe Company is the manufacturer of the original Hall's safes.

The Hall's Safe & Lock Company, having an established business and reputation as manufacturer of Hall's safes, sold all its real estate and leasehold interests, trade-marks, and good will to the Herring-Hall-Marvin Company, successor and assignee to the original complainant in this suit, agreeing to dissolve and not again engage in the same business. This agreement was signed by E. C. and W. H. Hall, as officers of the Hall Safe & Lock Company. Subsequently H. C., W. H., and C. O. Hall organized the defendant corporation, the Hall's Safe Company.*

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge.[10] * * * The gravamen of the complaint is that the defendants invade and injure the good will and reputation of the complainant's business by the adoption of the corporate name of the defendant, the "Hall's Safe Company," and also by inducing the public, through advertisements, circulars, and other representations, to believe that their safes are the product of the complainant's business. The defendants admit the acquisition by complainant of the properties, including the good will, of the Hall's Safe & Lock Company, but claim that the individual defendants were not by the sale of the latter company deprived of the right to organize a new company which shall include their family name, and that the name of "Hall's Safe Company," is one which may lawfully be adopted. * * *

Upon this contention it becomes important to determine what were and are the relations between the complainant and its predecessor in title and the several defendants. Undoubtedly the Herring-Hall-Marvin Company acquired by its contract of purchase with the Hall Safe & Lock Company all its physical properties and the good will which it had acquired in its business, as well as the right to use such trade-names as had been customarily used to identify its products. It acquired also the right to require that the Hall's Safe & Lock Company should go out of business, or, in substance, that it should not longer engage in business of the kind which it sold to the Herring-

* Statement of facts rewritten.

[10] A part of the opinion is omitted.

Hall-Marvin Company. But it is contended that the contract reaches beyond the corporation, the Hall Safe & Lock Company, and binds the defendants who were stockholders and officers of the corporation, and prevents them and any corporation of which they may become stockholders and managers from doing what the Hall Safe & Lock Company could not do; and the principal reason for this contention is the fact that these individual defendants participated in the sale, and as stockholders received its benefits.

We are of opinion that this proposition cannot be sustained. The contract which the Herring-Hall-Marvin Company had was with the corporation only, and not with its stockholders or officers. The officers who conducted the business of the selling company were not parties to the contract. It is a familiar rule that an agent, who, having lawful authority, makes a contract with another for a known principal, does not bind himself, but his principal only (Story on Agency, § 261; Mechem on Agency, § 555; Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050); and the officers of a private corporation, in respect to their liability on contracts entered into by them in behalf of the corporation, stand upon the same footing as agents of private individuals (21 Am. & Eng. Ency. of Law [2d Ed.] 879; Whitney v. Wyman, supra). If the purchaser desired to make the officers and agents of the selling corporation subject to the stipulations of the company in the contract of sale, it should have required their personal agreement to that effect.

The cases cited by counsel for the complainant to support their contention that the court may look through the form of a corporate organization, and fasten upon the stockholders a liability for the acts of the corporation, do not support such a doctrine as applicable to contract relations. These are State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541, McKinley v. Wheeler, 130 U. S. 630, 9 Sup. Ct. 638, 32 L. Ed. 1048, and Anthony v. American Glucose Co., 146 N. Y. 407, 41 N. E. 23. They were all cases where, for special purposes and in special circumstances, the court held that it was competent and proper to regard the rights and duties of stockholders in corporations. None of them impugns the general rule above stated that in matters of contract the officers and agents of a corporation are not bound personally by stipulations made by them in behalf of their principal. This rule is not affected by the circumstance that they are indirectly interested as stockholders in the contracts of their corporation. If it were so, it would break down all distinction between the corporate entity and its component parts.

Counsel for the appellee have printed in their brief a recent decision, not yet published, of the Circuit Court of Appeals for the Seventh Circuit, in a case entitled Hall's Safe & Lock Company and James W. Donnell v. Herring-Hall-Marvin Safe Co. The suit was brought

to restrain the defendant from using in its business the corporate name of the complainant as descriptive of its products. The defendant filed a cross-bill to restrain the complainant in the original bill from using the name of the Hall's Safe & Lock Company in their business of making and selling safes, and from selling such safes as "Hall's Safes." It appears from the opinion that Donnell had organized an Illinois corporation, the codefendant, with the name of the old Hall's Safe & Lock Company, having no member of the name of Hall, and was carrying on the safe business under that style at Chicago. The court holds—what we should suppose quite clear—that this assumption of the name of "Hall's Safe & Lock Company" was a fraudulent device to appropriate the good will of the old company, to which the Herring-Hall-Marvin Safe Company had succeeded. It is also held that the defendant in the cross-bill should be restrained from selling safes which were not of the manufacture of the Herring-Hall-Marvin Company, as "Hall's Safes." It was claimed that the defendant in the cross-bill was selling under that name safes made by the Hall's Safe Company, the defendant here. It was only in this incidental way that the rights of the Halls were considered, and of course they could not be adjudged in that suit.

We do not think there is any substantial difference between the conclusion of that court upon the propriety of the use of the designation "Hall's Safes" and our own. We think it quite likely that court would have accepted the qualification that the use of such a designation in the business of the Halls would not be unlawful provided it was accompanied by explanatory matter showing that the product was their own, and not that of the old company or its successors in business. It is true that the learned judge who delivered the opinion said arguendo that the court might look behind the corporation, and find whether there were equities between the Herring-Hall-Marvin Company and the members of the Hall's Safe & Lock Company which would attach to the Hall's Safe Company, of which they are now members, and, concluding there were such equities, proceeded to deduce the consequences. Without repeating what we have said upon this subject, we are constrained to think that the defendants Hall were not bound individually, in law or in equity, by the contract of their corporation.[11] * * *

The costs of this appeal will be borne by the appellant Hall's Safe Company and the appellee, to be equally divided.

[11] **Accord:** See Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 273, 28 Sup. Ct. 288, 52 L. Ed. 481 (1907).

ROUGH et al. v. BREITUNG.

(Supreme Court of Michigan, 1898. 117 Mich. 48, 75 N. W. 147.)

Action by James H. Rough and others against Edward N. Breitung for breach of contract.

The Davis Mining Company was a foreign corporation, organized in Illinois. The plaintiffs were the owners of the entire capital stock; Rough being president and Nightingale secretary. They had always transacted business as a corporation. The contract in suit was embraced in the following writings:

"Chicago, Dec. 19, 1895. Mr. James Rough, Mining Inspector, Negaunee, Michigan—Dear Sir: The parties I have will take the Davis mine, and all the property, machinery, etc., belonging thereto on the following terms: We will pay all the debts of the mining company as reported to me per statement of the secretary, Mr. Nightingale, and also those incidental debts that you mentioned in our conversation on my last trip to Negaunee, and give stockholders of the Davis mine, as it now stands, $3,000 in first mortgage bonds to be secured on all property of the Davis and Milwaukee mines, said bonds to be made payable on or before six years from January 1st, 1896, at 5 per cent. per annum. If you can accept these terms, let me know at once, so I can obtain coal and make necessary improvements. Telegraph me at once upon receipt of this at Hotel Richelieu, so that I may know just what to do. Yours, very truly, E. N. Breitung."

Telegram: "Dec. 20th, 1895. E. N. Breitung, Care Hotel Richelieu, Chicago, Ill.: Letter received; will accept terms as stated in the letter. James H. Rough."

Pursuant to this agreement the books of the company were delivered to Breitung. The mining lease owned by the Davis Mining Company was assigned to Breitung by the Davis Mining Company by indorsement of Rough and Nightingale as officers of the company. Defendant took possession and transacted business as the Davis Mining Company, signing his name as secretary and treasurer. January 1, 1896, the defendant wrote to the Davis Mining Company purposing to rescind the agreement for various reasons set forth. The laws of Michigan provided that all contracts made by foreign corporations failing to pay a franchise fee after the 1st of January, 1894, shall be wholly void. This fee had never been paid by the Davis Mining Company.

When the plaintiffs had rested their case, the court directed a verdict for the defendant, because under the first count of the declaration, and under the undisputed evidence, plaintiffs were simply stockholders of the corporation, and, although owning all the capital stock, they were not owners of its property, which belonged to the corporation, and that as stockholders they did not possess the right or title to the property, so that they could convey it. The court also held

Stockholders do not own title to the property

that there could be no recovery under the second count, because the evidence was undisputed that there was no sale of the capital stock, the Davis Mining Company was a necessary party to the litigation involving the sale of its property, and the corporation had never paid the franchise fee.[12]

GRANT, C. J.[13] * * * 2. Under the second count, it becomes necessary to determine what the contract was and with whom it was made. The offer stated in the letter of December 19th, and the telegram accepting it, constitute the contract. Its terms are clear and unmistakable. All prior conversations and negotiations, whether written or verbal, cannot be invoked to change the letter of the contract. The defendant offered to buy "the Davis Mine, and all the property, machinery," etc., "belonging thereto." It was not an offer to buy the stock of the individual stockholders. This is further made clear by the proposed terms of payment, to wit, to pay all the debts of the mining company and $3,000 to the stockholders. It meant a purchase of the franchise of the corporation, with all its rights and property. The letter was written to the president of the company. There is nothing in the record to indicate that the parties understood that the one was selling and the other was buying the stock of the plaintiffs. Their conduct at the time and subsequently clearly shows that they understood that they were acting in a corporate capacity, and not as individual stockholders. They retained their certificates of stock. They had previously attempted to sell defendant 12,000 shares of it, but he refused to purchase. They made no tender of the certificates until the close of the trial.

The original declaration was filed March 26, 1896, and was upon the common counts alone. Nothing further appears to have been done in the case until July 6, 1896, when they filed an amended declaration containing a special count setting forth that they were the owners of the property, and describing it, and that they had sold it to the defendant for $26,000. To this amended declaration the defendant pleaded the general issue. Subsequently, by the permission of the court, he filed an amended plea, giving the special matters in defense as stated in his letter of January 31, 1896. Plaintiffs, by leave of the court, on March 20, 1897, filed a second amended declaration, in which for the first time they alleged a sale of the stock.

There was no corporate action taken by the stockholders or by the directors authorizing the transaction. The assignment of the lease was made by the secretary and treasurer in behalf of the corporation, and on the face of it was a corporate act. Stockholders do not own the corporate property, and cannot mortgage, sell, or convey it. The title is in the artificial being called the corporation, not in the stockholders. Such property is not under the control of its stockholders,

[12] Statement of facts substituted.

[13] A part of the opinion is omitted.

whether they act separately or collectively. The laws under which these corporations are organized provide the agencies and methods by which their property can be sold and transferred. Randall v. Dudley (Mich.) 69 N. W. 729; Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; Fitzgerald v. Railway Co. (C. C.) 45 Fed. 812; England v. Dearborn, 141 Mass. 590, 6 N. E. 837; Button v. Hoffman, 61 Wis. 20, 20 N. W. 667; Baldwin v. Canfield, 20 Minn. 43, 1 N. W. 261; Gashwiler v. Willis, 33 Cal. 11. * * *

The artificial being known as the Davis Mining Company was still in existence after the alleged sale and transfer to defendant. The transfer of the stock book to him, either individually or as secretary of the company, did not operate to cancel the stock standing in the names of these plaintiffs. They might have sold the stock to an innocent purchaser, who would take a good title. Such certificates, in the absence of some provision of law to the contrary, stand upon the same basis as commercial paper, and innocent persons and pledgees take title by assignment and delivery. McLean v. Medicine Co., 96 Mich. 479, 56 N. W. 68, and authorities there cited.

We are forced to the conclusion from this record that this was a corporate contract, and void under the law above cited. While the corporation might be estopped to plead such a contract in its defense, it cannot maintain an action upon it without annulling the law. Seamens v. Temple Co., 105 Mich. 400, 63 N. W. 408; Society v. Lester, 105 Mich. 716, 63 N. W. 977; People v. Hawkins, 106 Mich. 482, 64 N. W. 736.

3. If, however, all the stockholders of the corporation could by unanimous action contract, instead of the corporation, acting through its properly authorized officers, it would not aid the plaintiffs. What such a corporation could not do in its corporate capacity all its stockholders acting together could not do for it. If the act or contract of the corporation is void under the law, so, also, is the joint act or contract of all the stockholders, designed to accomplish the same purpose and thus evade the law. The judgment is affirmed. The other justices concurred.

PEOPLE'S PLEASURE PARK CO., Inc., et al. v. ROHLEDER.

(Supreme Court of Appeals of Virginia, 1908. 109 Va. 439, 61 S. E. 794.)

Action by one Rohleder against the People's Pleasure Park Company, Incorporated, to enforce covenants contained in a deed, and to cancel a deed to defendant and enjoin defendants from making a certain disposition of property. From a decree granting an injunction, defendant appeals.

CARDWELL, J.[14] * * * It is further averred that, after the title to the remaining land (Fulton Park) had again been acquired by

[14] A part of the opinion is omitted.

Black and wife, they conveyed it as a whole to the Revere Beach County Fair & Musical Railway Company, excepting the lots previously sold, and in this conveyance is the covenant, condition, and stipulation: "The title to this land never to vest in a colored person or persons"—that afterwards the Revere Beach County Fair & Musical Company transferred the property to one Jessie M. Smith, providing in the deed that the same should be subject to the covenant, condition, or stipulation imposed thereon by Black in his deed to the company; that, after Jessie M. Smith had held the property a few months, she transferred the title thereto by a conveyance from herself as an individual to herself as trustee without specifying the nature of the trust or naming the beneficiary or beneficiaries thereof, and omitting mention of the "covenant, condition, or stipulation" under which she had held the property, as an individual; that Jessie M. Smith, as trustee, but without disclosing the nature of the trust or the beneficiary or beneficiaries thereof, conveyed the property again to Ida M. Butts, trustee, making no mention of a restriction upon the latter's power to alienate the property, or as to whom she might convey it; and that on or about May 3, 1906, a deed was recorded in the clerk's office of Henrico county, by which all the unsold portion of Fulton Park was conveyed by Ida M. Butts to one D. G. Fulton, who by deed recorded in the same office, on the same day, conveyed the property to appellant, People's Pleasure Park Company, Incorporated. The bill then charges that the People's Pleasure Park Company is a corporation composed exclusively of negroes, and that this corporation purchased Fulton Park for the express purpose of converting the same into a park or place of amusement for colored people; that the corporation before it purchased the property was fully apprised of the "condition, covenant, or stipulation" theretofore in the bill mentioned as having been incorporated in the deed conveying the property to the Revere Beach County Fair & Musical Company, and also aware of the pendency of injunction proceedings to prevent said appellant from acquiring title to Fulton Park. * * *

The deeds exhibited with the bill, conveying lots in Fulton Park to individual purchasers, and the deed of the residue of the land to the Revere Beach, etc., Company, were conveyances in fee simple, with general warranty and all the usual covenants of title; and between the grant of a fee-simple estate, followed by a description of the property, and the covenants of title, appears this language: "Subject to the following restrictions: the title to this land never to vest in a person or persons of African descent" or "colored person." If the conveyance to appellant corporation, People's Pleasure Park Company, was not a conveyance to "a person or persons of African descent" or "colored persons," it is clear that the bill is fatally defective on demurrer, since the parol conditions upon which appellee alleges she bought her lots cannot be ingrafted on the deed containing the restriction. Dev. on Deeds, § 976. * * *

Aside from the question whether or not appellee could obtain the relief she asks against appellants—that is, an annulment of the conveyance to appellant, People's Pleasure Park Company, Incorporated—on the ground that the restriction on the right of alienation of any of the Fulton Park land to "a person or persons of African descent" or "colored person" had been violated by a sale of a part of the land to said appellant, the bill fails to allege facts showing a violation of the restriction, and should have been dismissed upon the demurrers thereto. Such a conveyance, by no rule of construction, vests the title to the property conveyed in "a person or persons of African descent." Although a copy of the charter of the grantee is filed as an exhibit with the bill and made a part thereof, and which sets out that the object for which the corporation is formed is "to establish and develop a pleasure park for the amusement of colored people," a contemplated sale of the property to "a person or persons of African descent" is not even alleged, but only a contemplated use of the property as a place of amusement for colored persons, which the restriction relied on neither expressly, nor by implication, prohibits.

"A corporation is an artificial person, like the state. It is a distinct existence—an existence separate from that of its stockholders and directors." 1 Cook on Corp. (4th Ed.) § 1.

Prof. Rudolph Sohm, in his Institutes of Roman Law, pp. 104–106, says: "In Roman law the property of the corporation is the sole property of the collective whole; and the debts of a corporation are the sole debts of the collective whole. * * * It represents a kind of ideal private person, an independent subject capable of holding property, totally distinct from all previously existing persons, including its own members. It possesses, as such, rights and liabilities of its own. It leads its own life, as it were, quite unaffected by any change of members. It stands apart as a separate subject or proprietary capacity, and, in contemplation of law, as a stranger to its own members. The collective whole, as such, can hold property. Its property, therefore, is, as far as its members are concerned, another's property, its debts another's debts. * * * Roman law contrived to accomplish a veritable masterpiece of juristic ingenuity in discovering the notion of a collective person; in clearly grasping and distinguishing from its members the collective whole as the ideal unity of the members bound together by the corporate constitution; in raising this whole to the rank of a person (a juristic person, namely); and in securing it a place in private law as an independent subject of proprietary capacity standing on the same footing as other private persons."

Marshall, C. J., in the Dartmouth College Case, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, defined a corporation as, "an artificial being, invisible, intangible, and existing only in contemplation of law."

In Green's Brice, Ultra Vires (2d Am. Ed.) §§ 1, 2, it is said that "a corporation is a person which exists in contemplation of law only, and not physically."

The same author in commenting on Kyd's definition says: "But sufficient stress is not laid upon that which is its real characteristic in the eye of the law, viz., its existence separate and distinct from the individual or individuals composing it. * * * This is the one important fact. The members of a corporation aggregate and the one individual who is constituted a corporation sole may, from their connection with such, have rights and privileges, and be under obligations and duties, over and above those affecting them in their private capacity; but they get them by reflection, as it were, from the corporation. They individually are not the corporation—cannot exercise the corporate powers, enforce the corporate rights, or be responsible for the corporate acts." * * *

For the above reasons, we are of opinion that the decree complained of is erroneous, and it will be set aside and annulled, the demurrers of appellants to the bill sustained, and the bill dismissed with costs to the appellants. Reversed.[15]

ULMER et al. v. LIME ROCK RAILWAY CO.

(Supreme Judicial Court of Maine, 1904. 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387.)

Report from the Supreme Judicial Court, Knox County. Bill by Fred. T. Ulmer and another to enjoin proceedings instituted by the Lime Rock Railway Company seeking to condemn a right of way over the complainant's premises for the purpose of a branch line to the plant of the Rockland-Rockport Lime Company. The defendant company was chartered with authority to construct lines of railway from the lime quarries in the city of Rockland and town of Thomaston in such direction as will best provide for the transportation of limestone from the quarries to the limekilns in said city and town, together with other freight. Power to condemn land for a right of way is given by statute.

The complainants ask that the proceedings for condemnation be enjoined on the grounds that the complainants' real estate is not to be taken for a public use by the railway company, but solely for the private use of the company and the owner of the quarry to which the branch in question is projected.[16]

[15] Accord: Baltzell et al. v. Church Home & Infirmary of Baltimore, 110 Md. 244, 73 Atl. 151 (1909).

[16] Statement of facts substituted.

WISWELL, C. J.[17] [After discussing the question of public purpose, the Court proceeds:]

Another cause of complaint, much relied upon in argument, and which appears in different forms of allegation throughout the bill, is that all of the stock of the railroad company is at the present time owned by the Rockland-Rockport Lime Company. It appears from the evidence that each of the directors of the railroad company is the owner of one share of its capital stock, and that all of the rest of the stock is owned by the lime company. It is argued from this that the lime company, a corporation organized purely for private purposes, with no duties to perform of a public nature, is in fact the owner of, and is in possession and control of, the railroad, and of all the franchises and privileges that were granted by the Legislature to the railroad company, and that as such owner it is operating and managing the same for the sole benefit of the lime company, to the exclusion of all others.

But the argument is based upon a wrong assumption. Whoever may be the owner of the stock of the railroad company, or however many or few such owners there may be, that corporation still continues to exist as a separate and independent corporation. It preserves its corporate existence. It operates its own road. It has its own officers and makes its own contracts. Although the lime company is the owner of nearly all of its capital stock, that company does not thereby become the owner of the railroad company's road, franchises, or other property. That corporation, whoever may be the owner of its stock, still owns its property. Neither do the stockholders of a corporation control the property of the corporation. Of course, a majority of the stockholders control the election of directors and other officers and agents of the corporation; but the control of the property of the corporation is in the corporation itself, and in its officers and agents who are invested with such control by virtue of the by-laws of the company.

The franchises granted to a railroad corporation must be exercised by that corporation, and by it alone. There is no identity between the individual or the corporation which owns stock in another corporation and that latter corporation. A corporation is an entity, irrespective of the persons who own all of its stock, and the fact that one person owns all the stock does not make him and the corporation one and the same person. It would seem that the citation of authorities in support of these well-established principles would be unnecessary, but we call attention to a few of the many that might be referred to: Pullman Palace Car Company v. Missouri R. R. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; Exchange Bank v. Macon Construction Company, 97 Ga. 7, 25 S. E. 326, 33 L. R. A. 800; Button v.

[17] A part of the opinion is omitted.

Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131; Morawetz on Private Corporations, § 227 et seq. We cannot, therefore, see how this allegation can in any way affect the question here involved. * * *

We have considered all the reasons set out in the complainants' bill why the relief asked for should be granted. In our opinion, it should not be granted for any of these reasons. The bill will therefore be dismissed, with costs. So ordered.

PEOPLE ex rel. UNION TRUST CO v. COLEMAN.

(Court of Appeals of New York, 1891. 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762.)

FINCH, J.[18] The relator has been assessed upon an "actual value" of its capital stock derived entirely from the market value of its shares. These are selling at the large premium of something over $500 for each share of $100, and the assessors have concededly taken that valuation, or the principal part thereof, as the "actual value" of the company's stock liable to taxation, instead of its own proved and established value. The relator challenges the assessment, and through all the proceeding has persistently raised and pressed the inquiry, not so much as to mode or manner of ascertaining value, but, rather, as to what is the precise thing to be valued,—whether the capital stock of the company, or the capital stock held in shares by the corporators. If these are the same, or, in any just sense, equivalents, either might be valued without substantial error; but, if they are not such, we must determine which is to be valued before we can solve the problem of how to value it.

Now, it is certain that the two things are neither identical nor equivalents. The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise, and the good-will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation; the other, to the corporators. The franchise of the company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock; while the same franchise does enter into and form part, and a very essential part, of the shareholder's capital stock. While the nominal or par value of the capital

[18] A part of the opinion is omitted.

stock and of the share stock are the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both; but that surplus is no part of the company's capital stock, and therefore is not itself capital stock. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and the franchise in addition; so that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus, and its franchise; but these three things, several in the ownership of the company, are united in the ownership of the shareholders. The share stock covers, embraces, represents all three in their totality; for it is a business photograph of all the corporate possessions and possibilities.

A company also may have no surplus, but, on the contrary, a deficiency which works an impairment of its capital stock. Its actual value is then less than its nominal or par value, while yet the share stock, strengthened by hope of the future and the support of earnings, may be worth its par, or even more. And thus the two things, the company's capital stock and the shareholder's capital stock, are essentially and in every material respect different. They differ in their character, in their elements, in their ownership, and in their values. How important and vital the difference is became evident in the effort by the state authorities to tax the property of the national banks. The effort failed, and yet the share stock in the ownership of individuals was held to be taxable as against them. The corporation and its property were shielded, but the shareholders and their property were taxed.

Now, some degree of confusion and trouble have come in because these two different things are denominated alike "capital stock," making the expression sometimes ambiguous. It is the important and decisive phrase in the law of 1857 under which the assessment here resisted was made, and requires of us to determine at the outset in which sense it was used. The section reads thus: "The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or shall have been exempted by law, together with its surplus profits or reserved funds exceeding 10 per cent. of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value, and taxed in the same manner as the other real and personal estate of the county."

There are reasons in abundance for the conclusion that by the phrase "capital stock" the statute means not the share stock, but the capital

owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise, and the chief factor in its safety. One ample reason is derived from the fact that the tax is assessed against the corporation, and upon its property, and not against the shareholders, and so upon their property. In theory, every tax is charged against some person, natural or artificial, resident or non-resident, known or unknown. It is assessed, not upon property irrespective of ownership, but against persons in respect to their property (People v. Commissioners, 23 N. Y. 215;) and effects, not merely a lien, but also a personal liability. On the assessment rolls in this case appeared the name of the relator as the person assessed, and the amount of the tax became a charge against it. Of course, it could only be assessed and taxed in respect to its own property,—that which in its corporate character it owned and possessed; and so it follows inevitably that the statute concerns the company's capital stock,—that is, its real and actual capital,—and not in any respect the share stock which it does not own, and whose possessors have not been assessed.

Another reason is found in those terms of the statute which include and exclude, respectively, specific kinds or classes of property in the corporate ownership. Thus, the assessment is to be laid, not merely upon the capital stock of the corporation, but also upon its surplus. No such explicit direction was necessary, except on the assumption that by the words "capital stock" was meant simply "capital," which would not include surplus, and so required that it be subjected by name to the valuation. If the share stock was meant, its value would include surplus, and make its specification not only needless, but confusing. But, while the statute includes surplus by specific mention, it excludes franchise by omitting it. The omission of franchise is emphasized by the careful inclusion of surplus. It is fully and definitely settled that the tax imposed by the statute is not upon franchise. People v. Commissioners, 2 Black, 620, 17 L. Ed. 451. But, if that be so, it is not upon the share stock, for that represents the value of the corporate franchise as a part of the total of the corporate property; and so, both by what it specifically includes and silently excludes, the statute itself informs us that by "capital stock" it means and intends the company's actual capital paid in and possessed, and not at all or in any sense the share stock.

The same thing becomes apparent from a study of the whole line of legislation which culminated in the law of 1857. It was traced in detail upon the argument with great industry and wealth of illustration. We have verified it by traveling over the same track, and, without taking pains to reproduce it, may assert the general result which it discloses, and select out one or more illustrations. The investigation shows that the word "capital" and the phrase "capital stock" are used interchangeably and synonymously, and, where the latter phrase oc-

curs, there is almost always something in the statute which stamps and labels it as referring to the actual capital of the company. Thus the law of 1823 (chapter 262,) after providing for the taxation of all persons owning or possessing property, proceeds to declare that corporations shall be deemed persons for the purposes of the act, and requires them to furnish a statement of the amount of "capital" actually paid in; and then, referring to turnpike and bridge companies, requires them to state "the amount of capital stock actually paid in or secured to be paid in." Both clauses refer to the same assets or fund, naming it indiscriminately "capital" and "capital stock." Again, in the law of 1825, (chapter 254,) the assessors, after putting the corporation by name on the assessment roll, are required to add the amount "of its capital stock paid in or secured to be paid in," and to designate how much of it is in real and how much in personal property, and so, no doubt is left that by "capital stock" was meant simply the "capital" possessed in cash or invested in securities or real estate.

The illustrations might be multiplied and fortified by reference to numerous acts relating to the formation or management of manufacturing, railroad business, and telegraph companies, in which the two forms of expression are used indiscriminately and as convertible terms; but I think quite enough has been said to require unhesitating assent to the proposition that, under the law of 1857, the thing to be taxed is the capital of the company, and not the shares of the stockholders.

Indeed, I should feel bound to apologize for arguing what seems to me so simple and plain a proposition, were it not for the fact that it has been largely ignored by assessors, and not always clearly kept in mind by the courts, and but for the further fact that the right to adopt, as the taxable valuation, the value of the shares, totally disregarding the value of the company's capital, has been asserted in this case, maintained by the courts below, and claimed to be fully justified by very much which we ourselves have decided or said.

Before examining the cases in detail, to see whether they hamper our freedom of judgment upon the question presented, I think it safe, and also prudent, to assert three things as applicable generally, and to all the cases alike: First, this court has never decided, either by a direct determination or by necessary implication, that the law of 1857 authorizes the imposition of a tax upon anything else than the actual capital of the corporations, together with their surplus; second, that the precise question whether the capital of the companies or the share stock of the shareholders forms the basis of valuation, and the thing to be assessed, has not been heretofore formally and distinctly presented; and, third, that all seemingly erroneous expressions of opinion are corrected at once when they are referred to the permissible conditions under which the value of the share stock in the market may be referred to, not as the thing to be valued and assessed,

but as an aid or help in discovering the value of the other and different thing which is to be valued and assessed. Keeping these general propositions in mind, we now recur to the cases. [After reviewing the authorities the Court proceeds:]

I think the authorities either fairly permit or fully justify the conclusions which I have reached, and which may be stated with reasonable accuracy thus:—First, the subject of valuation and assessment is never the share stock, but always the company's capital and surplus; second, such capital and surplus must be assessed at its own value, and, when that is correctly known and ascertained, no other value can be substituted for it; third, where its amount and value are undisclosed and unknown, the assessors may consider the market value of the share stock, and the general condition of the company, as indicative of surplus or deficiency, and of the probable amount of either; fourth, they may further resort to such means of information when the amount of capital and surplus is disclosed, but the assessors have sufficient reason to disbelieve the statement, and such reason is founded upon facts established by competent proof.

If these conclusions are correct, it will follow that the assessment complained of should be canceled. The corporation presented to the assessors a sworn statement of its assets and liabilities. If it be true, there was nothing subject to assessment. But its truth is not questioned, and there is not the least reason to doubt it. The assessors did not doubt it. They merely deemed it immaterial, and so testified when examined. In other words, knowing with certainty the value of one thing, they claimed the right to affix to it the larger value of a different thing. Authorized only to tax against the company its capital and surplus, they assumed the right, practically, to tax it for the share stock held by individuals. They have not in terms claimed that the share stock is the subject of taxation, nor has the counsel who represented them on the argument, but both have maintained and defended what is the exact and complete equivalent. The right asserted is a discretion in the assessors, at their free will, to assess corporations upon and at the value of their capital and surplus, or upon and at the value of the share stock, independently of established facts, and whenever they please. The law gives them no such discretion. How it has been exercised, and how destructively to the rights of tax-payers, may be seen by comparing the action in this case with that in one of the cases which we have reviewed. Where the share stock was selling at 90, and so below par, the assessors refused to take that value, and went to the company's books in search of a larger one, which they found and adopted. Here, where the actual value of capital and surplus is established so that they frankly admit the fact, they calmly disregard it, and fly to the larger value of the share stock. The statute has given them no such right. They are not lawless rovers, wandering among corporations at will, but regular officers, bound by discipline and con-

trolled by the law, and whose discretion exists within fixed and definite limits.

It is said, and it is true, that large masses of personal property escape taxation, and the owners are persistent and artful, and not overnice, in their efforts to avoid a just share of the public burdens, and so we should uphold faithful assessors in every attempt to do their full duty. I think this court will not be unmindful of the situation, but, before all, we must first ascertain, and then obey, the law. If in that process evils result or are disclosed, the remedy must be sought elsewhere.

It follows that the judgment and order of the general and of the special term should be reversed, and the assessment against the relator vacated and canceled, without costs. All concur, except PECKHAM, J., not voting, and GRAY, J., absent.

UNITED STATES ELECTRIC POWER & LIGHT CO. v. STATE.

(Court of Appeals of Maryland, 1894. 79 Md. 63, 28 Atl. 768.)

McSHERRY, J.[19] We find no difficulty in affirming the judgment appealed from in this case. The appellant is a company incorporated under the laws of Maryland, and transacts its business within this state. It has a capital stock divided into shares, and owns real and personal property. This real property has been duly assessed for taxation, and the valuation placed thereon has been deducted from the assessed value of the capital stock, as required by section 141, art. 81, of the Code. The state taxes upon the company's real estate have been paid, and so, also, have the state taxes on its shares of stock. In addition to these taxes, the state levied, under the Act of 1890, c. 559, a further tax of one-half of 1 per cent. on the gross receipts of this and other like companies, and for a failure to pay this latter tax the pending suit was instituted. The defense relied on is that the gross-receipt tax is a double tax upon the same property, and therefore unauthorized and illegal. It is claimed to be a double tax because it is insisted that the value which the capital stock possesses after the assessed value of the real estate has been deducted is such, only, as arises out of the ownership and operation of the franchises of the company, and, as a tax on gross receipts is a tax on the franchise, a tax on the capital stock, whose value is the ownership and use of the company's franchises, is an additional tax on the same thing; but this argument is obviously fallacious.

The taxable value of shares of capital stock is fixed by the state tax commissioner. He is required, by the statutes, to deduct from the

[19] A part of the opinion is omitted.

aggregate value of all the shares of the capital stock of banks and other corporations the assessed value of the real estate owned by the company, and to divide the residuum by the number of shares of the stock, and the quotient is declared to be the taxable value of each share for state purposes of taxation. Upon the valuation thus ascertained, the state tax is levied. But the tax is not a tax upon the stock, or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the state tax. It is not material what assets or other property make up the value of the shares. Those shares are property, and, under existing laws, are taxable property. They belong to the stockholders, respectively and individually, and when, for the sake of convenience in collecting the tax thereon, the corporation pays the state tax upon these shares into the state treasury, it pays the tax, not upon the company's own property, nor for the company, but upon the property of each stockholder, and for each stockholder, respectively, by whom the company is entitled to be reimbursed. Hence, when the owner of the shares is taxed on account of his ownership, and the tax is paid for him by the company, the tax is not levied upon or collected from the corporation at all.

The gross-receipt tax is quite another and a different thing. It is a tax imposed upon the corporation because of the value of its franchises as distinguished from its ownership of tangible and visible property. And, while the value of its franchises may to some extent give value to its capital stock, the gross-receipt tax is not a tax upon the owner of the stock measured by the value of the stock, but upon the corporation as the owner of the franchise or right to exist and to transact business, which franchise or right, though property, is the property of the artificial body as a body corporate. It has been repeatedly held by this court that a gross-receipt tax may be validly imposed. State v. Philadelphia, W. & B. R. Co., 45 Md. 379; State v. Northern Cent. R. Co., 44 Md. 169.

As, then, the tax, in the one instance, is upon the owner of the capital stock, whose liability is fixed by the value placed upon the shares by the state tax commissioner, and in the other instance the tax is upon the corporation, the extent of whose liability is measured by the amount of its gross receipts, it is perfectly apparent that the two taxes are not upon the same individual, natural or artificial, in consequence of his or its ownership of the same property, notwithstanding the franchises of the corporation in some measure give value to the shares of stock.

But, if this were conceded to be a double tax, it would not necessarily, on that amount, be void. The declaration of rights requires equality in taxation, and, in so far as a double tax destroys that equality, it is invalid, but not otherwise. Cooley, Tax'n, 161, etc. Taxes are levied upon the individual, and not upon property, though the value

of the property owned by him is the standard by which the extent of the individual's liability is ascertained and measured. Hence, the imposition of a tax twice upon one person for the same purpose, because of his ownership of a particular piece of property, would be a double tax, which, in consequence of its inequality, would not be sustained. But when the same property represents distinct values belonging to different persons, be those persons natural or artificial, both persons may be lawfully taxed, and the amounts of their separate contributions would be fixed by the values which the same property represented in the hands of each, respectively; and this would not be double taxation, in the sense in which it is obnoxious to the organic law. * * * Judgment affirmed, with costs.[20]

CITY OF LOUISVILLE v. McATEER et al.

SAME v. LOUISVILLE WATER CO.

(Court of Appeals of Kentucky, 1904. 81 S. W. 698, 26 Ky. Law Rep. 425, 1 L. R. A. [N. S.] 766.)

Suit by the city of Louisville for mandamus to compel John McAteer and others to pass upon the assessment of the Louisville Water Company. From a judgment refusing the mandamus, the city appeals. Petition by the city of Louisville against the Louisville Water Company, and from a judgment dismissing the petition the city appeals.

O'REAR, J.[21] The question for decision in this case is whether the property of the Louisville Water Company is liable for taxation by the city. For five years before the beginning of these suits the water company had not been assessed on any of its property for taxation for city purposes. It claims that its property is exempt from city taxation because the city owns all its stock, or did own all but one or two shares for the years in question. The Louisville Water Company is a corporation created by an act of the Legislature approved March 6, 1854 (Acts 1853–54, p. 121, c. 507). Its location, and that of most of its property, is within the city of Louisville. Its business is to furnish water to the citizens of Louisville and vicinity, for which it charges rates based upon the quantity of water used. Many years ago the city, by authority conferred by the Legislature and exercised by the city council, subscribed and otherwise acquired the great majority of the capital stock of the corporation, and now owns all of the stock. This stock is owned by the sinking fund commissioners of the city. The water company owes a large bonded debt, secured by mortgage on its plant. The income of the water company is used to pay the expenses of operating and maintaining the plant, then to pay the

[20] Accord: Crown Cork & Seal Co. v. State, 87 Md. 687, 40 Atl. 1074, 53 L. R. A. 417 (1898).

[21] A part of the opinion is omitted.

interest on its bonded debt, and then to provide a sinking fund for the ultimate payment of its debt. Rates to consumers are fixed so as to meet these fixed charges. No dividends are paid on the stock. The plan is and has been to operate the plant so as to place the price of water to consumers at the lowest possible figure. As the net income increases, rates are lowered. The contention of the water company in these cases is that, as the city owns all the stock, it in effect owns the plant; that to tax the plant is to tax the city, which it must pay by levying and collecting other taxes from its taxpayers, thus doing the absurd thing of going to the trouble and expense of taking money from one pocket to put it in the other.

It is not true, in law, that the owner of all the stock of a corporation owns the property of the corporation. Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629; Fietsam v. Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492; People v. Watertown, 1 Hill (N. Y.) 616; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541. Even if there was not the weight of authority for the last statement, the city would scarcely want to take the full effect of its contention, for, if it did, then it would follow that the company's debt was the city's debt; adding the bonded debt of the water company, of about one and one-half millions, to the city's other authorized debt, might operate to invalidate some of its recent bond issues. If, upon a foreclosure of the mortgage upon the water plant, it was insufficient to pay the bonded debt, the city would not care to be bound for the balance because it happened to own all the debtor corporation's stock.

There is another fallacy in appellee's position: This is not an effort to tax the capital stock or shares of the water company. If it were, then the question would be here whether the city could tax its own property for its own uses. There is a marked distinction, though, between taxing the property of a corporation and taxing its shares of stock. Cook on Stock & Stockholders, §§ 7, 567; Bank of Commerce v. Tennessee, 161 U. S. 416, 16 Sup. Ct. 1113, 41 L. Ed. 211; Tennessee v. Whitworth, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. Ed. 830. Cases from other jurisdictions are cited as authority for the proposition that a municipality cannot tax its own property for city purposes. Strictly, these cases are made to turn upon the legislative intent, as, in our opinion, this one must also turn. It is generally held that, unless expressly authorized or directed by statute, it will not be considered that a municipality was authorized or required to list its own property for taxation for its own purposes.

If it be conceded that taxing the plant of the water company, all the shares of which are owned by the city, is indirectly a taxing by the city of its own property, it brings us directly to consider the source of appellant's power and the extent of its duty to tax alike all property within its jurisdiction. Section 171 of the Constitution of

this state requires that taxes "shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws." Section 170 of the same instrument creates and limits the exemptions from taxation. It provides: "There shall be exempt from taxation public property used for public purposes." This is the only reference to property owned by a municipality. Property owned by or on behalf of the public, but not used for public purposes, is not exempt. "The express mention of one thing implies the exclusion of another." That the water company, if owned by the city, is public property, is not questioned. But although its stock is owned by the city, and the property is used in supplying the citizens water, the waterworks are not "used for public purposes," within the meaning of section 170, supra, and are subject to taxation for state and county purposes. City of Louisville v. Commonwealth, 1 Duv. 295, 85 Am. Dec. 624; Negley, Sheriff, v. City of Henderson, 55 S. W. 554, 21 Ky. Law Rep. 1394; Same v. Same, 59 S. W. 19, 22 Ky. Law Rep. 912; Clark, Sheriff, v. Louisville Water Co., 90 Ky. 522, 14 S. W. 502, 12 Ky. Law Rep. 309. * * *

For the reasons indicated, the judgment of the circuit court in the suit against McAteer, etc., refusing the mandamus against the board of equalization to compel them to pass upon the assessment of the water company's property as returned by the assessor, and the judgment of the circuit court in the franchise tax case, dismissing the city's petition, are each reversed, and they are remanded for proceedings consistent herewith.[22]

PAYNTER and HOBSON, JJ., dissent.

HEARST et al. v. PUTNAM MINING CO. et al.

(Supreme Court of Utah, 1904. 28 Utah, 184, 77 Pac. 753, 66 L. R. A. 784. 107 Am. St. Rep. 698.)

Action by a stockholder to set aside a conveyance of property made by the Putnam Mining Company, a corporation, to the Quincy Mining Company. The bill alleges that the transfers were fraudulent and asks that the conveyances be declared void and prays for a decree compelling the Quincy Mining Company to account for all the money and stock received by the latter company, or due to it, to ascertain the just proportion that shall be paid by the defendants to the plaintiffs and that upon such accounting judgment be entered in favor of the plaintiffs for the amount due them.[23]

[22] See accord: (semble) Bank of United States v. Planters' Bank of Georgia, 9 Wheat. 905, 6 L. Ed. 244 (1824).

[23] Statement of facts substituted.

BARTCH, J.[24] The decisive question presented in this case is whether the court erred in overruling the demurrer to the special and separate defense set up in the answer, and in denying the motion to strike out that portion of the answer.

The appellants contend that the judgment in the case of Rogers v. Ferry et al., wherein the Putnam Mining Company was made a defendant, constitutes no bar to this suit, and that their demurrer should have been sustained and their motion granted.

The respondents insist not only that this action is barred by the judgment in the Rogers Case, but also that these plaintiffs must fail because they have brought and are attempting to maintain this suit in their own right, and not in the right of the Putnam Mining Company, although they claim only as stockholders of the corporation. The position of the respondents seems to be sound. And first as to the suit having been brought for the benefit of the plaintiffs, in their own right, and not that of the Putnam Mining Company: In their complaint the plaintiffs allege the corporate existence of the Putnam Mining Company; that they are stockholders of the corporation; that the corporation owned and operated certain mining property; that, through certain fraudulent dealings and transactions, the directors and agents of the company conveyed all its property to Ferry and his associates; and that, although the property has since been very productive, and has paid large sums in dividends, no accounting has been made to the plaintiffs, nor to the Putnam Mining Company. They then demand that the alleged fraudulent dealings and transactions be set aside, and the instruments of conveyance decreed null and void; that an accounting be had of all the money and stocks received by or due the vendee; that the just proportion to be paid the plaintiffs be ascertained; and that judgment be entered in their favor for the amount found due them. They then ask "for such further or all other relief as plaintiffs may be entitled to in equity and good conscience." They thus sue in their own right and for their own benefit only, notwithstanding the general allegation that the suit is also for the benefit of others who are in like situation, and who may appear as parties.

They appear to proceed upon the theory that, because of the alleged fraudulent transactions, they are cestuis que trust of a constructive trust, or a trust created in their favor, ex maleficio, by wrongful acts of the defendants, in dealing with the property and assets of the Putnam Mining Company. Under the facts disclosed by this complaint, no suit can be maintained upon such a theory. As has been seen, the allegations of the complaint clearly show that all the property in controversy was owned by and belonged to the corporation, and not to the plaintiffs, and it is not disputed that the corporation could own and hold its corporate property in absolute right, same as an individual. Nor can it be, for a corporation is a distinct entity, an artificial person,

[24] A part of the opinion is omitted.

created by law, and, as such, in this state, is capable of suing and being sued, of acquiring, owning, and disposing of property, within the objects of its creation, the same as a natural person; and one may deal with it, respecting its property, the same as with an individual owner, and without any greater danger of being held to have received property into his possession burdened with a direct trust or lien. Being a creature of statute, and having conferred upon it its individuality by law, which has endowed it with a legal existence, independent of any or all of its stockholders, the corporation has the same dominion over its corporate property, with the same right of disposition, as a private person has over his.

In Weyeth H. & M. Co. v. James-Spencer-Bateman Co., 15 Utah, 110, 121, 122, 47 Pac. 604, 608, it was said: "The natural person has such powers and rights as are conferred upon him by nature, except as restricted by human laws for the good of society. The artificial person or corporation has such powers and rights as are conferred upon it by the law of its creation, and such as are incidental and necessary to its corporate existence. Both the natural and artificial personages act in an individual capacity. Among the most important attributes of a natural person are his absolute dominion over his property and his right of disposition, and the same may be said of a corporation aggregate as to its corporate property. It has the right to contract and be contracted with, to sue and be sued, to implead and be impleaded, the same as a natural person; and it has the right to do all other acts in regard to its property that a natural person may do in regard to his."

Since, then, the corporation was capable of owning, and in fact did own, the property in controversy, absolutely, as a distinct entity, how could that property be held to be property in trust for the benefit of persons who are admittedly not the owners thereof, and who have, at most, but an interest in the fund created by the operation or disposition of the property? The very fact that the plaintiffs were not the owners of the property in dispute precludes the idea of a trust having arisen in their favor, ex maleficio or otherwise, for in the existence of every trust there are three essential elements, the absence of any one of which is fatal to the trust. These are a trustee, a beneficiary or cestui que trust, and property belonging to the cestui que trust. Here the property proposed to be impressed with a trust does not belong to the plaintiffs, and, as to them, is not in trust, they having but an indirect interest therein; and neither the plaintiffs nor any other stockholders have any interest or estate in the property, legal or equitable, which they can enforce in their own right and for their own special benefit. Nor is there any trust relation which enables a stockholder to sue in such a case. "The relation of trustee and cestui que trust, or of debtor and creditor, or of partnership, does not exist between the stockholders of an incorporated company and the corporation itself. But the corporation and the individual shareholder may deal with each other

at arm's length, the same as two strangers may, and a shareholder may contract with his corporation, and sue and be sued on his contracts." 1 Thomp. Corp. § 1076.

If a right of action exists, because of the alleged fraudulent acts and dealings in relation to the property in controversy, it exists in favor of the corporation, and of necessity the action must be brought in the right of the corporation for its benefit. If the defendants must account to any one for the property in litigation, the accounting must be to the corporation, and not to the plaintiffs or any other stockholders. The prayer of this complaint, in effect, asks the court to adjudge that the defendants have obtained for themselves, through fraudulent acts and dealings, the property of the corporation, and, instead of asking that the property so obtained, or its proceeds, be returned to the rightful owner, demands that the plaintiffs, for their own benefit, be decreed a portion of the fruits of the fraud. In other words, according to their prayer, they seek to obtain a portion of the property and assets of a third party, which they say was obtained from such third party by fraud.

That a stockholder of a corporation cannot recover corporate property, fraudulently or otherwise disposed of by the officers or agents of the corporation, by suing in his own right and for his own benefit, is settled by the authorities. It is true, where the property or assets of a corporation have been sequestered and dissipated by fraud or otherwise, a stockholder may, if the board of directors will not act, and a suit clearly ought to be brought, sue in the right of the corporation to have its property restored to it, or to obtain for it such other relief as the circumstances may demand, but in no such case can he sue for himself in his own right. This right of a stockholder to sue, in cases of fraud, for the benefit of the corporation, when it will not sue, is an exception to the general rule "that actions to redress wrongs done to a corporation must be brought by the corporation itself, and that such actions cannot be brought by its stockholders." 4 Thomp. Corp. § 4488. * * *

There are instances, however, where a stockholder may apply to a court of equity for a preventive remedy by injunction to restrain those who are administering the affairs of the corporation from doing acts which are ultra vires, or to prevent a misapplication of the corporate funds which might result injuriously to the stockholders, where the acts intended to be performed would amount to a breach of trust. In such and like cases a preventive remedy may be applied at the instance of a stockholder, but such cases are wholly different from those like the one at bar. * * *

BASKIN, C. J., and MCCARTY, J., concur.

GALLAGHER v. GERMANIA BREWING CO. (BARGE et al., Interveners).

(Supreme Court of Minnesota, 1893. 53 Minn. 214, 54 N. W. 1115.)

MITCHELL, J. The plaintiff, as assignee of one Westphal under a general assignment for the benefit of creditors, brought this action to recover for goods sold and delivered by his assignor to the defendant corporation. Barge & Vander Horck intervened, and set up in their complaint that they owned, and for nearly two years had owned, (each one half,) all the capital stock of the defendant, no other person but themselves having any interest in the stock or property of the corporation; that each of them had a valid and unsatisfied judgment against Westphal upon a cause of action which accrued before the assignment to plaintiff; that Westphal was, and for over two years had been, utterly insolvent; and that his estate, of which plaintiff is the assignee, was so hopelessly insolvent that it was insufficient to pay even the expenses of administering the assignment. The relief sought was that their claims against Westphal might be allowed, in equal amounts, as equitable set-offs to the claim of the plaintiff against the defendant corporation. From an order overruling a demurrer to the complaint, the plaintiff appeals, his contention being—First, that Barge & Vander Horck had no such interest in the litigation as to entitle them to intervene; second, that their claims cannot be set off against a claim against the corporation, because a corporation is a legal entity, entirely distinct from its stockholders.

These two propositions amount really to the same thing, for, if Barge & Vander Horck cannot set off their claims against that of plaintiff against the corporation, they have no such interest in the subject of litigation as would entitle them to intervene; on the other hand, if their claims are proper, equitable set-offs, their right to intervene for the purpose of setting them up is very clear. The case is certainly a novel one, for we doubt whether an instance can be found in the books where stockholders ever attempted to set up their several equities by way of set-off to claims against the corporation. Of course, the want of a precedent is by no means controlling with courts, especially in administering equitable relief; but it would seem that, if the relief here asked was consistent with legal or equitable principles, some case would be found where it had been granted. The facts of the present case appeal to a natural sense of justice, for while, by fiction of law, a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property. Hence, if interveners cannot set off their claims, the practical result is that Westphal's estate will collect its entire claim out of what is really their property, while the estate is at the same time indebted to them on claims of greater amount, which they will wholly

lose because of Westphal's insolvency; but, as has been often said, hard cases are liable to make bad law.

The right of equitable set-off is, of course, not derived from, or dependent upon, statute, but rests upon a distinctly equitable doctrine, which courts of equity have applied on certain well-recognized equitable grounds, the object being to effect a clear equity and prevent irremediable injustice; and it may be stated as a general rule that, whenever necessary to accomplish that end, the courts will permit an equitable set-off, although the debts accrued in different rights; as, for example, by allowing a separate debt to be set off against a joint debt, or, conversely, a joint debt against a separate debt. They will also disregard the nominal parties to the record, and consider the real parties in interest; as, for example, when the assignor of a chose in action sues for the benefit of the assignee, or a trustee for the benefit of the cestui que trust. Hence, had the plaintiff's claim been a joint one against the interveners, there would have been no doubt of their right to set off their separate claims against it, for insolvency is well recognized as a distinct equitable ground for allowing such a set-off.

But such a case is not analogous to the present. To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders, and to treat it as a mere association of individuals who are the real parties in interest. In dealing with the rights of creditors, and the obligations existing between a corporation and its shareholders by reason of their contract of membership, undoubtedly the courts often find it necessary to consider the real parties in interest as the individual shareholders; but it may be laid down as a rule that, except in such cases, it has been found absolutely essential, for the administration of justice, to treat a corporation as a collective entity, without regard to its individual shareholders. In no other way can the title to corporate property be kept free from complication and uncertainty. The transferable nature of stock in a corporation is also a good reason why the theory of a corporate entity should be preserved, and why it is necessary to discriminate sharply between corporate rights and obligations and those of shareholders personally. If the rights or liabilities of a corporation could be affected by the acts of the stockholders, except when acting in the corporate name, or if shareholders could set up their several equities against persons having claims against the corporation, or, conversely, if claims in favor of the corporation could be set off against claims against individual stockholders, it can easily be seen into what confusion and chaos corporate affairs would inevitably fall.

Inasmuch as the two interveners own all the stock of this corporation, the facts of this case seem comparatively free from embarrassments, and the contention of respondent quite plausible. But, suppose there were 50 other stockholders, (which would not alter the princi-

ple,) what would be the result? Could interveners then interpose their claims as set-offs, and, if so, could they do so to the full amount of their claims, or only in the proportion which their shares bore to the whole capital stock? And, if the former, would they have a claim for the excess against the corporation, or a right to call on the other stockholders for contribution?

Again, the right of set-off, if any exists, must be mutual. Hence, if stockholders can interpose their individual demands as set-offs to a demand against the corporation, it follows that a defendant can set up demands against the individual stockholders as set-offs to demands in favor of the corporation. Illustrations might be multiplied indefinitely to show that to recognize any such right would result in the worst sort of complications, and that the only safe or sound rule is to adhere strictly, in such cases, to the doctrine of a corporate entity distinct from the individual stockholders.

What means, if any, the interveners might have had, or may hereafter have, of protecting themselves, it is not now our business to inquire, but we are clear that their claims against plaintiff's assignor are not the subjects of equitable set-off to a claim against the defendant corporation. Order reversed.

VANDERBURGH, J., absent, took no part.

SECTION 3.—THE CORPORATION AS A PERSON.

WILLMOTT v. LONDON ROAD CAR CO., Limited.

(Supreme Court of Judicature. [1910] 2 Ch. Div. 525.)

COZENS-HARDY, M. R.[25] This is an appeal from a judgment of Neville, J., by which he has declared that the London General Omnibus Company, being a corporation, is not a respectable and responsible person within the meaning of a covenant contained in a lease which I will read in a moment, and has declared that the lessor is entitled to recover possession of the demised premises. The appeal raises a question undoubtedly of importance and undoubtedly too, in my judgment, of difficulty. Two learned Judges, Romer, J., and Neville, J., have taken a view which, with the utmost respect, I am unable to accept. The lease was a lease granted in 1900 to a Mr. Porter of some premises at Putney. The rent was £95 a year. The property was insured for £5,000; it was a valuable property apparently, and the lease contained this covenant. [His Lordship read the covenant.]

[25] Facts sufficiently stated in the opinion of the Master of the Rolls and part of the opinion omitted.

Mr. Porter did assign to the present defendants, the London Road Car Company, in 1901, and the plaintiff gave his consent to the assignment. The defendants were minded to assign to the London General Omnibus Company. It is quite immaterial, but we are told that the assignment was part of a scheme of reconstruction.

The real question, and the only question which has been decided by Neville, J., is that in his view a corporation is not a "person" and cannot be a "responsible and respectable person" within the meaning of this covenant. I think it is necessary to consider with some care what is the true prima facie meaning of the word "person"—what is its meaning at common law and apart from any statutory enactment. I go back to Lord Coke and his exposition of the Statute of 39 Eliz. c. 5. The language of the statute there was quite positive. It was a statute that all and every person and persons seized of an estate in fee simple might—I am stating the substance of the act very shortly—found hospitals or almshouses, and Lord Coke upon those words "all and every person and persons" says this (2 Inst. [1797 Ed.] p. 722): "These words regularly doe extend to any body politick or corporate, but not to such as are restrained by any act of Parliament to alien &c., but doth extend to such bodies politick and corporate as may alien." He does not put that on any context in the act—on the contrary there is no context—but he puts it as a general proposition. "These words regularly doe extend to any body politick or corporate such as may alien." Of course a corporation which had no power of alienation could not be a person within the meaning of this act, which says that any person may alien. It did not authorize an act which was otherwise ultra vires. Then we come to Blackstone's authority. The passage which was read by Farwell, L. J., from the Commentaries (I, 123) is quite explicit. "Persons are divided by the law into either natural persons, or artificial." Then, again, we come to the very important case of Pharmaceutical Society v. London and Provincial Supply Association, 5 App. Cas. 857, in the House of Lords. Lord Selborne, in language which I think is perfectly unambiguous, said that prima facie in a statute the word "person" would include an artificial person or a corporation. Lord Blackburn indicated the same view, although he said he was not so clear about it. It is said, True, that may be so as to statutes, but that is a construction which is limited to statutes; it has no application to instruments even of the most formal character under seal such as this lease is. Is there any authority for that? So far as I am aware there is not. Is there any authority to the contrary of that? I think there is, for Chitty, J.'s, decision in In re Jeffcock's Trusts, 51 L. J. (Ch.) 507, which was a case of a will, shews that where trustees of a will have power given to them to grant leases to any person or persons as they may think fit, a limited company, that is to say, a corporation, is, within the meaning of that power, a person to whom the trustees may lawfully and properly grant a

lease. I am not aware that the precise point has arisen with reference to a lease, but certainly I should be most unwilling to draw a distinction which I think would be contrary to the whole trend of modern dealings, and to say that a corporation in a lease of this kind was not to be regarded as a person.

The real stress of Mr. Peterson's and Mr. Draper's able arguments rested on the words "responsible and respectable." Let me take them one by one. It is plain, of course, that under this lease and apart from this covenant a company could be an assign of the lease. There is no dispute about that. It was not ultra vires of the company to accept a lease and it was perfectly competent to become an assign. Suppose the words had simply been that consent should not be withheld in the case of a responsible person, I cannot bring myself to doubt that in that case a company which was admitted to be responsible in the sense of being able to discharge all obligations in respect of rent and covenants under the lease would be a responsible person within the meaning of that covenant, and therefore a person with respect to whom consent could not be refused. But then it is said, and this is the point which alone has given me difficulty in this case, "Can it be said that a corporation can be respectable? Does not the addition of that word 'respectable' compel you to say that in this case the word 'person' must be limited to an individual, a human personality, a person who is capable of acts moral or immoral?" In my opinion that is not so. I think the ordinary use of language justifies you in saying that a company is a respectable company. We all use that language habitually. We talk of a respectable insurance company, or a respectable bank, and in that case we refer to the mode in which the company or the bank conducts its business. But I think we are not without assistance from authority which is absolutely binding on us. A limited company or a company whether limited or not can maintain an action of libel for an injury to its reputation without proving any special damage. South Hetton Coal Co. v. North Eastern News Association, [1894] 1 Q. B. 133, which is a decision of this court in 1893, is a clear authority on that point. The material passages of the judgments have been read and I do not propose to read them again. I am content to rely on a passage there quoted from the judgment of Pollock, C. B., in Metropolitan Saloon Omnibus Co. v. Hawkins, (1859) 4 H. & N. 87, 90, where he says that in order to carry on business it is necessary that the reputation of a corporation should be protected, and therefore in cases of libel and slander it must have a remedy by action. A company can have a reputation which is not the reputation of the individual directors, but the reputation of the company, the reputation which the company itself and itself alone can protect by means of an action of libel.

Are we to draw a distinction and say, "True, that might be applicable if the word in the covenant had been 'reputable,' but it is not 'rep-

utable' but 'respectable'?" I decline to draw that fine distinction. It seems to me that the better view (which I think is in accordance with modern policy and the trend of all mercantile proceedings) is to say that a company in a clause of this kind is a person who may be both respectable and responsible, and that therefore there can be no right to refuse to assign to it. In other words, I think, taking the whole context of this clause, that it really amounts to this: "You shall not assign or underlet without my previous consent, but such consent shall not be withheld in the event of the contemplated assignee or underlessee, who might be an incorporated company, being a respectable and responsible person," the word "person" being there used as a term which is equally applicable to an artificial and to a natural person. * * *[26]

DOW et al. v. NORTHERN RAILROAD et al.

(Supreme Court of New Hampshire, 1887. 67 N. H. 1, 36 Atl. 510.)

Case Reserved from Merrimack County.

Bill in equity, by Samuel H. Dow and John E. Robertson, stockholders in the Northern Railroad, against the Northern Railroad, the Boston & Lowell Railroad, and the directors of the Northern Railroad, seeking to enjoin the operation of the Northern Railroad by the Boston & Lowell Railroad under a contract of lease. Answers were filed, and the case was heard at the trial term before Carpenter, J., both parties introducing evidence. Facts were found by the court, and the case was reserved for the law term by request of parties. Decree for plaintiffs.

The facts material to the points upon which the case was decided are as follows: The Northern Railroad was chartered in 1844. The corporation was authorized to construct and keep in use a railroad from Concord to Lebanon. Section 11 provides that "the legislature may alter, amend, or modify the provisions of this act, or repeal the same, notice being given to the corporation, and an opportunity to be heard." The road was constructed and put in operation within a few years after the charter. Chapter 100, Laws 1883, enacts that (subject to certain conditions and qualifications) "any railroad corporation may lease its road, railroad property, and interests to any other railroad corporation," upon such terms and for such time as may be approved by a two-thirds vote of the stockholders of each corporation. Section 17. This act contains no provision for the compensation of dissenting stockholders. It was assumed that the Northern Railroad had notice of the proposed passage of this statute. On June 18, 1884, the stockholders of the Northern Railroad, by a vote of more than two-thirds, approved a lease to the Boston & Lowell. On the same day,

[26] Concurring opinions of Lord Justices Moulton and Farwell are omitted.

pursuant to this vote, the Northern Railroad, by its president, executed to the Boston & Lowell Railroad a lease for 99 years of the railroad, rolling stock, etc., of the lessor; the lessee to pay a specified quarterly rental, and perform various other covenants. The plaintiffs voted against approving the lease, and seasonably filed their bill in equity, praying that the Boston & Lowell Railroad be enjoined from operating the Northern Railroad under the lease, and that the Northern Railroad and its directors be ordered to assume the management of the road.

DOE, C. J.[27] The Northern Railroad is the name of "a collection of many individuals, united into one body," with certain rights and duties. Kyd, Corp. 13. A private business corporation is "an association formed by the agreement of its shareholders," and its existence "as an entity, independently of its members, is a fiction." It is "essential to bear in mind distinctly that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being." Mor. Priv. Corp., preface. "The statement that a corporation is an artificial person or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body. A corporation is really an association of persons. * * *" Mor. Priv. Corp. § 227.

By the first section of the Northern Railroad charter (Laws 1844, c. 190) it is enacted "that Timothy Kenrick" and twenty other persons, "their associates, successors, and assigns, shall be and hereby are made a body politic and corporate by the name of the Northern Railroad." Here is no evidence of an attempt to introduce a mystery, or to create a fictitious being, to whom the state can give neither body nor mind. The stockholders are the corporation. They have the entire equitable title and beneficial interest of the property by them put in the corporate trust, and they are the corporate trustee in whom is vested the legal title. All of them, assembled at their annual meeting, choosing their seven directors by ballot, and exercising their stockholding rights in any other legal act, would be the visible body, and the acting mental and moral faculty, whose partnership name is the Northern Railroad. They are made a body, not by the legislature, but by their own several acts of becoming stockholders and joint principals. Under the common law, without a charter, they can form a partnership body by becoming stockholders and joint principals in the business of a stagecoach common carrier between Concord and Lebanon. Under general law, without a special act of incorporation, if a majority of them are inhabitants of this state, they can make themselves a railroad corporation. Laws 1883, c. 100. "May associate themselves together, by written or printed articles of agreement, for the purpose of forming a railroad corporation," is the language of the

[27] A part of the opinion is omitted.

act. They are no more made a body by the law than they would be if they should form a corporation under the act of 1883, or an unincorporated partnership under the common law. Whether they are incorporated or not, their company is formed by their contract with each other, and it has such powers and duties as the law allows them to give it, and such as the law grants and imposes. For whatever legal purposes their corporate body may be regarded as unreal the fiction does not vest all the property in an imaginary being, and does not make the shareholders owners of an imaginary capital stock, for the purpose or with the consequence of giving to the majority of them, or to the state, a leasing power which the majority or the state would not have if the partnership were not incorporated.[28] * * *

STATE ex rel. ATTORNEY GENERAL v. STANDARD OIL CO.

(Supreme Court of Ohio, 1892. 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541.)

The State, by its Attorney General, commenced this action to oust the defendant of its rights to be a corporation, on the ground that it had abused its corporate franchises by becoming party to an agreement that is against public policy. The agreement in question was entered into by the stockholders of the defendant company, together with the stockholders of other corporations, partners and individuals, whereby the stock held by the contracting parties was conveyed to trustees, with power to vote and manage the corporation and enterprises thus controlled. The contracting parties received trust certificates in lieu of the stock surrendered. The purpose of this agreement was to secure a uniform control over the principal organizations engaged in the oil business. This purpose is alleged to be contra to public policy and ultra vires of the defendant corporation.[29]

MINSHALL, J.[30] Three questions arise upon the pleadings: (1) Should the defendant, the Standard Oil Company, be regarded as a party in its corporate capacity to the agreement constituting the Standard Oil Trust? (2) Had the company power to become a party to such an agreement? (3) If so, is the right of the state to demand a forfeiture of its corporate franchises, or of the power to make and perform such agreements, barred by lapse of time?

1. It will be observed on reading the answer that while the defendant denies that it "entered into or became a party to either or both of the agreements in said petition set forth," and also "denies that it has at any time or in any manner acquiesced in or observed, performed, or

[28] For a detailed discussion of the principles of this case, see 6 Harv. Law Rev. 161, 213; 8 Harv. Law Rev. 295, 396.

[29] Statement of facts abridged.

[30] A part of the opinion is omitted.

carried out either or both of said agreements," it does not deny the averment of the petition that "all of the owners and holders of its capital stock, including all the officers and directors of said company, signed said agreements." Nor could it have been the intention to do so, as the answer proceeds to admit "that it [the corporation] is informed and believes that the individuals named in the agreement, being the same individuals who executed" it, "did enter into the agreements set forth" in the petition; claiming "that said agreements were agreements of individuals in their individual capacity and with reference to their individual property, and were not, nor were they designed to be, corporate agreements." The claim is based upon the argument that the corporation is a legal entity, separate from its stockholders; that in it is vested all the property and powers of the company, and can only be affected by such acts and agreements as are done or executed on its behalf by its corporate agencies, acting within the legitimate scope of their powers; that its stockholders are not the corporation; that their shares are their individual property, and that they may each and all dispose of and make such agreements affecting their shares as best suit their private interests; and that no such acts and agreements of stockholders, subservient of their private interests, can be ascribed to the company as a separate entity, though done and concurred in by each and all of its stockholders.

The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders by distinguishing between the corporate debts and property of the company and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim in fictione juris subsistit æquitas is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction, they have always been disregarded by the courts. Broom, Leg. Max. 130. "It is a certain rule," says Lord Mansfield, C. J., "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted." Johnson v. Smith, 2 Burrows, 962.

No reason is perceived why the principles applicable to fictions in general should not apply to the fiction "that a corporation is a personal entity, separate from the natural persons who compose it, and for whose benefit it has been invented." One author seems to think that it has outlived its usefulness; that it is "a stumbling block in the

advance of corporation law towards the discrimination of the real rights of men and women," and should be abandoned. Tayl. Corp. § 51. * * *

Applying, then, the principle that a corporation is simply an association of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers, and directors of the company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled, through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act.

It therefore follows, as we think, from the discussion we have given the subject, that where all, or a majority, of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is ultra vires of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in quo warranto. * * *

Judgment ousting the defendant from the right to make the agreement set forth in the petition, and of the power to perform the same.

PEOPLE v. NORTH RIVER SUGAR REFINING CO. (1890) 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843, Finch, J.: "The abstract idea of a corporation, the legal entity, the

impalpable and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the state, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable, intangible and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in People ex rel. v. K. & M. T. R. Co., 23 Wend. 193, 'Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court.' "

UNITED STATES v. MILWAUKEE REFRIGERATOR TRANSIT CO. et al.

(Circuit Court, E. D. Wisconsin, 1905. 142 Fed. 247.)

SANBORN, District Judge.[81] This is a bill in equity for an injunction to prevent the payment of alleged rebates on freight, brought under Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]. The defense outlined in argument of the demurrers is that it appears on the face of the bill that the alleged rebates were not paid back to the shipper (the brewing company), but to the Refrigerator Transit Company, and, in substance and effect, nothing more is shown than the payment to a soliciting agent (the transit company) of a commission of an eighth or tenth of the published tariff rates, thus showing, in real effect, acts neither unlawful, immoral, nor injurious. * * *

[81] A part of the opinion is omitted.

The Question of Corporate Identity or Control.

It is further essential, to bring the case within the law, that the repayments be made to the brewing company, or for its benefit, directly or indirectly, and not merely to third persons for obtaining the business; otherwise the repayment is no more than a salary or other expense incident to the carrier's business. The remaining question, then, is whether this is sufficiently shown in the bill. It is forcibly argued that the bill carefully avoids the statement that the brewing company received the money repaid, or even that it was paid back for its benefit; and that the two corporations are not only distinct legal entities, but have different stockholders. The bill shows the creation, by the controlling interests of the brewing company, of a dummy corporation, with dummy directors, and scienter of its character by the carriers, with intent to evade the law. It is argued that these averments show that the transit company is merely the alter ego of the brewing corporation; both being substantially identical in interest and control, and the brewing company the ultimate beneficiary, in some form, of the operations in question. Now is not this the usual device of a shipper securing discrimination by manipulation of carriers in which it is interested?

That the transit company is controlled by the managing agents of the brewing company is entirely clear. But is it controlled by the shipper corporation? The solution of this question depends on whether the brewing corporation, in a case like this, is an association of individuals, rather than a legal entity apart from those who own and control it. No doubt the general rule that a corporation is a legal entity, an institution, artificial, intangible, existing only by legal contemplation, and separate and apart from its constituents, is firmly imbedded in the common law of this country. It has been so laid down in hundreds of cases. In the Dartmouth College Case Chief Justice Marshall adopted and expressed it, almost in the exact language of Lord Coke, in Coke on Littleton, 27b; and this definition has been universally approved, especially in cases involving the extent of the corporate powers.

It is, however, most significant that the Supreme Court of the United States was the first to break away from the notion that a corporation is only a legal entity, when its literal application would operate with injustice. If a corporation is only a legal entity, of course, it cannot be a citizen of a state. Hence the Supreme Court, in order to sustain the most important and far-reaching jurisdiction of the national courts over corporations, depending on the citizenship of the parties, was obliged to adopt some other theory of corporate constitution than that laid down by the great chief justice. This was accomplished by holding that a corporation is an association of persons who may have citizenship, and following this with the adoption of a fiction of law, supported by a conclusive presumption, by

which the members of a corporation are conclusively presumed to be citizens of the state creating it. Hope Ins. Co. v. Boardman, 5 Cranch, 57, 3 L. Ed. 36; Louisville, etc., R. Co. v. Letson, 2 How. 497, 11 L. Ed. 353; Marshall v. R. Co., 16 How. 314, 14 L. Ed. 953. In reaching these results, the court, in answering the argument that a corporation is an artificial person, a mere legal entity, invisible and intangible, said that it was not reasonable that those who deal with corporate affairs or agents should be deprived of the valuable privilege of litigating in the federal courts by a syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent. 16 How. 327, 14 L. Ed. 953. "For all purposes of acting, contracting, and judicial remedy," said Mr. Justice Grier, "they can speak, act, and plead only through their representatives or curators." Id. Thus the idea that a corporation is, for some purposes, an aggregation of individuals, and not a legal entity, was adopted, through a fiction of law, and given full effect. It was the same kind of fiction by which the English Court of Exchequer usurped jurisdiction by permitting an allegation that plaintiff was the King's debtor, and then allowing no one to deny it. * * *

Applying the rule here laid down to the circumstances shown to surround the brewing company and transit company, can it be doubted that there really is, in substance and effect, an identity of interest, or that the brewing company, considered as an association of individuals, really owns and fully controls the transit company? Or that the payment of the eighth or tenth of the rate is in reality, and in some form, a payment to, or for the benefit of, the shipper? I think sufficient is alleged to show this. Moreover, it clearly appears that the shipper practically controls the transit company, and I think this shows a sufficient identity of interest among the shareholders of both in these repayments to make them rebates, if paid and received with unlawful intent. It is said that the procurement of the shipments through the contract is the mere soliciting of them for the carriers, for which they are lawfully authorized to pay a part of the rate, in order to get the business; and the transit company, owning a large number of refrigerator cars, and wishing to keep them employed, simply gives the freight to those competing shippers who will make the best terms, the business being of great volume, and the sums paid for freights large. But this theory of innocence is exploded by the fact, as alleged (whatever the actual proof may show), that the transit company is a mere separate name for the brewing company, being in fact the same collection of persons and interests. Assuming the truth of the averments, the device adopted is "neither new, nor deserving of new success." As the patent lawyers say of an aggregation, there is no new mode of operation, new use, or new result—simply the use of old things in a different situation. * * *

SAN MATEO COUNTY v. SOUTHERN PAC. R. CO. (1882) 13 Fed. 722, 743, Field, J.: "Private corporations are, it is true, artificial persons, but with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this state they are formed under general laws; and the Civil Code provides that they 'may be formed for any purpose for which individuals may lawfully associate themselves.' Any five or more persons may by voluntary association form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads, and cross mountains and deserts with them; they erect churches, colleges, lyceums, and theaters; they set up manufactories, and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing which is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations. There are over 500 corporations in this state; there are 30,000 in the United States, and the aggregate value of their property is several thousand millions.[22] It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think that it is well established by numerous adjudications of the supreme court of the United States and of the several states, that whenever a provision of the constitution, or of a law, guaranties to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents."

[22] Note.—The number of corporations here stated is much less than the number actually existing. There are over 5,000 corporations in California alone.

THE JURISTIC PERSON.

For discussion of the nature of a juristic person, see Legal Personality, 27 L. Q. R. 90; Corporate Personality, 24 Harv. Law Rev. 253 and 347; The General Principles of the Law of Corporations, Carr (York Prize Essay, 1902); Early Forms of Corporateness, 3 Ang. Am. Leg. Essays, 161; History of Business Corporations Prior to 1800, 2 Harv. Law Rev. 105, 3 Ang. Am. Leg. Essays, 195; Pollock and Maitland, History of English Law, Vol. 1, pp. 469–495, 425 and 660-661; The Juristic Person, 57 Am. Law Reg. (O. S.) 131 (U. of Pa. Law Rev. and Am. Law Reg.); Legal Personality of a Foreign Corporation, 22 L. Q. R. 178; The Personality of the Corporation and the State, 21 L. Q. R. 365; Historical Development of the Common-Law Conception of a Corporation, 42 Am. Law Reg. (N. S.) 529; Corporations at Home and Abroad, 2 Colo. Law Rev. 351; Maine, Ancient Law, 181; Nature of Corporations, 12 Pol. Sci. Qr. 273; Freund, Legal Nature of Corporations (University of Chicago—Studies in Political Science).

CHAPTER II

FORMATION

SECTION 1.—STEPS ESSENTIAL TO ORGANIZATION

PEOPLE ex rel. BERNARD et al. v. CHEESEMAN et al.

(Supreme Court of Colorado, 1884. 7 Colo. 376, 3 Pac. 716.)

HELM, J.[1] Relators, in the name of the people, seek by an action in the nature of quo warranto to directly challenge the corporate existence of "The Union Depot & Railroad Company." Their theory is that respondents, under that name, wrongfully usurped the privileges and franchises of a corporation; that respondent's attempted organization of the company was void ab initio, by reason of a failure to comply with the precedent requirements of our general incorporation act. The action is brought under chapter 28 of the Code of 1883.

It is somewhat doubtful if relators are in position to maintain the same in the name of the people or otherwise, giving the Code provisions the interpretation most favorable to them. But we prefer to base our determination of this proceeding in error upon other grounds. * * *

We have no doubt but that in this state a substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and that a failure to comply therewith in any material particular is ground for the impeachment of corporate existence, in an appropriate proceeding prosecuted by the proper authority.

Twelve different alleged defects are named and discussed at length in the briefs. Many of these, however, are already disposed of, and we only deem it important to consider two of the remainder.

1. Was the fact that the articles of incorporation provide for an existence of 50 years fatal? Section 238 of the General Statutes requires that these articles shall state, among other things, "the term of existence, not to exceed twenty years." The defect here suggested is not an omission to insert something required. Respondents comply with the statutes by declaring the term of existence. As to the length of this term they ask more than the law allows. In the face of a restriction to 20 years they assume the right to act for 50. This statutory provision as to time may, we think, properly be re-

[1] A part of the opinion is omitted.

garded as a limitation; and we are of opinion that the irregularity is not such a non-compliance with law as operated to prevent the corporation from coming into existence. It cannot without renewal live for 50 years; but, so far as this objection is concerned, it may exercise the rights and privileges of a corporation in carrying on the business intended for the period of 20 years.

2. Was there a fatal defect in the certificate of acknowledgment of the articles of incorporation? This certificate is as follows:

"State of Colorado, Arapahoe County—ss.:

"I, William B. Tebbets, a notary public within and for the county of Arapahoe and state of Colorado, do hereby certify that on the twenty-fourth day of November, A. D. 1879, personally appeared before me the persons whose names are signed to the foregoing articles of association, namely, Walter S. Cheeseman, Bela M. Hughes, D. C. Dodge, A. A. Egbert, and J. F. Welborn, and they each of them acknowledged that they had signed the foregoing articles of association for the purposes therein set forth. In testimony whereof, I have hereunto set my hand and affixed my official seal this, the day and year aforesaid.

"[Seal.] William B. Tebbets, Notary Public."

The specific objection to this certificate is that it is not stated therein that "the individuals who acknowledged the same were personally known to the officer who took the acknowledgment, or proven to him to be the persons who executed the certificate." Were this omission in the certificate of an acknowledgment to a deed conveying real estate, we might be constrained to hold such certificate defective. Such is the conclusion reached under a statute identical with our section 212, which provides for the acknowledgment of instruments relating to realty. Shephard v. Carriel, 19 Ill. 319. But the statute under which the certificate of acknowledgment to these articles of incorporation was made, contains no such specific requirement as said section 212; it simply declares that the acknowledgment shall be "before some officer authorized to take the acknowledgment of deeds." The declaration that the same officer shall officiate does not necessarily imply that he must certify to precisely the same matters in both instances. The provision requiring the officer to state that the individual subscribing and the one acknowledging are personally known by him to be identical, was inserted for the purpose of preventing one individual from personating another in the execution of instruments relating to real estate. As will be observed, the notary public certifies that the persons whose names are signed to the articles of incorporation under consideration personally appeared before him. In early times this would have been ample in the certificate to an acknowledgment of a deed to realty, and we are satisfied that it is a sufficient compliance with the incorporation statute upon the subject.

The judgment of the district court will be affirmed.

PEOPLE v. MONTECITO WATER CO. et al.

(Supreme Court of California, 1893. 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172.)

Action by the people against the Montecito Water Company, C. B. Hall, and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

TEMPLE, C. Plaintiff apepals from a judgment entered upon demurrer to complaint. The demurrer was general, and on the ground of insufficiency of the facts.

It is a proceeding taken by the attorney general of the state, in the nature of a quo warranto, to deprive the defendant corporation of its corporate charter, and procure its dissolution on two grounds—First, for want of a substantial compliance with the statutory requirements in its formation; and, second, for abandonment and misuse of its corporate franchise and powers, and for alleged violations of law.

In answer to the first point the respondent raises the preliminary objection that, by making the corporation a defendant, its corporate character is admitted, and cannot be questioned in this proceeding. As authority for this proposition the case of the People v. Stanford, 77 Cal. 360, 18 Pac. 85, and 19 Pac. 693, 2 L. R. A. 92, is chiefly relied upon.

In that case it was alleged in the complaint that the assumed corporation had never been a corporation. If it were not a corporation of any character, it had no legal existence, and could not be sued. By making it a party, plaintiff conceded that it was a person that could be sued. It was said that the corporation could not be treated as a person which could be sued simply to obtain a judgment; that it was not and never had been such a person. There is no such inconsistency here. It is averred that the corporate defendant is a corporation de facto, but it is claimed that it did not become a corporation de jure, because the persons who attempted the incorporation did not comply with the conditions which the statute makes conditions precedent to its rightful incorporation. Under such circumstances, although the association is a legal entity, which may be sued, its right to corporate existence may be questioned by the state in a proceeding of this character. Section 358, Civil Code.

This court said in People v. La Rue, 67 Cal. 530, 8 Pac. 84, and repeated the language in First Baptist Church v. Branham, 90 Cal. 22, 27 Pac. 60: "A corporation de facto may legally do and perform every act and thing which the same entity could do or perform were it a de jure corporation. As to all the world, except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and even as against the state, except in direct proceedings to arrest its

usurpation of power, it is submitted its acts are to be treated as efficacious." Under such circumstances it seems clear that the corporation is not only a proper, but a necessary, party. People v. Flint, 64 Cal. 49, 28 Pac. 495; People v. Gunn, 85 Cal. 244, 24 Pac. 718.

It is contended that the corporation is not rightfully such because, while five incorporators signed the articles of incorporation, only four acknowledged the same. Section 292 of the Civil Code reads as follows: "The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property." It was said in People v. Selfridge, 52 Cal. 331: "The right to be a corporation is in itself a franchise; and, to acquire a franchise under a general law, the prescribed statutory conditions must be complied with." Still, a substantial, rather than a literal, compliance will suffice. People v. Stockton & V. R. Co., 45 Cal. 313, 13 Am. Rep. 178.

Was there substantial compliance in this case? Because a substantial compliance will do, it does not follow that any positive statutory requirement can be omitted, on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court. What is a substantial, rather than a literal, compliance, may be illustrated from the cases.

In In re Spring Valley Waterworks, 17 Cal. 132, the certificate stated the place of business, but did not describe it as the "principal place of business," as required. The court said: "The statement that San Francisco was the place of business would seem to imply that it was not only the principal, but the only, place of business." In People v. Stockton & V. R. Co., 45 Cal. 306, 13 Am. Rep. 178, the affidavit required in such cases to be attached to the certificate stated that 10 per cent. of the amount subscribed had been actually paid in, omitting the words "in good faith," which the statute required. In the certificate it was stated that more than 10 per cent. had been actually in good faith paid in. It was held sufficient, and it would seem that, if it was actually paid in cash, it must have been paid in good faith; and it was further held that payment by checks drawn against sufficient funds in a bank, which was ready to accept and pay the checks, was substantially payment in cash. In People v. Cheeseman, 7 Colo. 376, 3 Pac. 716, the acknowledgment taken by the notary omitted to state that the persons whose acknowledgments were taken were personally known to the notary. The certificate did state that the persons who signed appeared before him and acknowledged it. The statute did not prescribe what the acknowledgment should contain, and it was held a substantial compliance with

the requirement, although the form prescribed for acknowledgments to deeds was not followed. It was acknowledged.

In all these cases it will be seen that the thing required was done, but not literally as directed; but there was no omission of any requirement. No case has been cited where the entire omission of a thing prescribed has been excused, unless it be the case of Larrabee v. Baldwin, 35 Cal. 155. That was not an action instituted by the state to disincorporate on the ground of noncompliance. As we have seen, unless the state complains, a de facto corporation must be considered, under our Code, as possessing a corporate character; and the stockholders, when sued upon their individual liability, should not be allowed to make the point that they did not comply with the law. In that case the certificate was signed by five directors, but two failed to acknowledge it. Other questions are discussed at great length in the opinion, but in regard to the point made on the certificate it was simply remarked: "It is not clear that any fatal defect exists in the certificate of incorporation. If so, it is cured by the act of April 1, 1864." Plainly it was unnecessary to consider the question.

The curative act referred to declares: "All associations or companies heretofore organized, and acting in the form and manner of corporations, and that have filed certificates for the purpose of being incorporated, but whose certificates are in some manner defective, or have been improperly acknowledged before a person not authorized by law to take such acknowledgments, are hereby declared to be, and to have been, corporations from the date of the filing of such certificates, in the same manner and to the same effect and intent as if such certificates were without fault, and properly acknowledged before the proper officer; and all such certificates are hereby validated, and declared to be legal, and shall have the same force and effect as if such certificates were free from all fault or defect, and were properly acknowledged," etc. St. 1863–64, p. 303.

Section 292 of the Civil Code requires the articles to be subscribed and acknowledged by each. As this is an express condition precedent to a valid incorporation, it is not of consequence to the court whether it be a wise or necessary requirement or not. Still it is easy to see a reason for it. The certificate secures the state, and all concerned, against the possibility of any fictitious names being subscribed to the articles, and furnishes proof of the genuineness of the signatures. If the acknowledgment can be dispensed with as to one, why not as to two or three, or all? Ordinarily, no doubt, the state would not be expected to institute a proceeding of this character for such a defect alone, and we must presume that the attorney general would not have instituted this inquiry if he were not convinced that there were reasons sufficient to justify it.

Other reasons are alleged; but, as the statute authorizes a proceeding to forfeit the charter where the statute has not been com-

plied with, although the corporation is acting in good faith, and is a de facto corporation, the complaint must be held to state a cause of action, and the demurrer should be overruled. The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.[2]

PLANTERS' FIRE & MARINE INS. CO. et al. v. STATE OF TENNESSEE, to Use of CITY OF MEMPHIS.

(Supreme Court of the United States, 1896. 161 U. S. 193, 16 Sup. Ct. 466, 40 L. Ed. 667.)

In Error to the Supreme Court of the State of Tennessee.

Bill by the state of Tennessee, for the use of the city of Memphis, against the Planters' Fire & Marine Insurance Company and F. B. Hunter. A decree for defendants was reversed by the state supreme court (95 Tenn. 203, 31 S. W. 992), and defendants bring error. Affirmed.

This is another bill filed by the state of Tennessee, for the use of the city of Memphis, against defendants below to recover taxes alleged to be due on the capital stock or shares of stock in the corporation plaintiff in error. The supreme court of Tennessee gave judgment in favor of the plaintiff below, and the plaintiffs in error have brought the case here for review. The case was tried upon an agreed statement of facts, among which are the following:

On the 24th day of March, 1860, the Energetic Insurance Company of Nashville was incorporated. By the sixtieth section of that charter it was provided "that said company shall pay to the state an annual tax or bonus of one-fourth of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes." On the 10th day of December, 1866, the Planters' Insurance Company was incorporated, and thereafter it conducted a general fire insurance business in the city of Memphis up to the year 1885.

[2] Filing the original articles of incorporation with the register of deeds does not constitute substantial compliance with a statute requiring that a verified copy be filed. Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324 (1900). Merely depositing a "certificate of organization" with the proper officer with instructions to record and return, such instructions being complied with, does not constitute a substantial compliance with a statute requiring that the certificate be filed. Bergeron v. Hobbs et al., 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85 (1897). As to recording articles of incorporation, see Byronville Creamery Ass'n v. Ivers, 93 Minn. 8, 100 N. W. 387 (1904). Compare San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295 (1902).

No immunity from taxation was granted that company. On the 27th day of March, 1885, the name of the Energetic Insurance Company was changed to the Planters' Fire & Marine Insurance Company of Memphis, and the company was authorized to remove its situs and office to the then taxing district of Shelby county, now the city of Memphis.

From the time of the passage of the act providing for the incorporation of the Energetic Insurance Company in 1860 down to the 30th day of January, 1884, no action was taken by the incorporators named in the act towards organizing a corporation accepting the charter. On the last named date a meeting was had of some of the incorporators named in the act, and the first minutes which can be found in the office of the defendant corporation, or which it can produce, are the minutes of the incorporators, stockholders, and directors held on that day. Six individuals were named in the original charter as incorporators, together with such other persons as might thereafter be duly associated with them, and at this meeting of the stockholders in January, 1884, four of them were present, and the other incorporators mentioned in the charter were dead at that time. It appears from those minutes that, pursuant to the terms and stipulations of an act of the legislature of Tennessee, a meeting was that day—January 30, 1884—called of the incorporators of the Energetic Insurance Company of Nashville, and in response to that call four of such incorporators appeared. A moderator was selected and books were opened, or ordered to be opened, for subscriptions to the capital stock of the company, and it was resolved that the first directory should consist of five persons. Stock was then subscribed by the various persons, amounting to $100,000, and, the stockholders thus subscribing being present either in person or by proxy, it was unanimously agreed by the incorporators present that the stockholders should go into an election for directors, and that the incorporators, as such, should adjourn. Thereupon, on the same day, it appears, from the minutes, that a meeting of the stockholders of the company was held, and a board of directors elected, and the stockholders then voted to call a meeting of the directors for the same day. A meeting of the directors was then held, and a president, secretary, and treasurer of the company elected, and from that day (January, 1884) the organization of the corporation plaintiff in error was regular and continuous.

After its name was changed by the legislature to the Planters' Fire & Marine Insurance Company, and it was authorized to remove its situs to the city of Memphis, its stock was increased to $150,000, and it removed its place of business to Memphis, and bought out the assets and property of the Planters' Insurance Company, and reinsured its risks. Since that time the defendant has regularly paid the commutation tax of one-fourth of 1 per cent. on each share of cap-

ital stock subscribed to the state of Tennessee, pursuant to the terms of the charter, up to the present time. By virtue of the general revenue laws of the state, the corporation plaintiff in error, or its stockholders, have been taxed upon the capital stock or shares of stock at a greater rate than that provided for in the sixtieth section of the act of incorporation, and the plaintiffs in error claim that, by virtue of that sixtieth section, they are entitled to exemption from all taxation, except that therein provided for.

Mr. Justice PECKHAM, after stating the facts in the foregoing language, delivered the opinion of the court.

The claim set up by plaintiffs in error is that the insurance company was duly incorporated as the Energetic Insurance Company of Nashville, under the act passed March 24, 1860; that it is the same company as therein incorporated, and entitled to all the benefits and immunities, among them that of exemption from taxation, granted by that charter.

The defendants in error deny that claim, and assert the right to tax by virtue of the general revenue laws of the state. They assert that, by reason of the failure to accept the charter, and organize thereunder, until after the lapse of 24 years, the corporation did not acquire the right of exemption provided for in the sixtieth section of the charter, because, at the time the company was organized, in 1884, the constitution of the state of Tennessee, adopted in 1870, was in full force, and by that constitution any exemption of the property of the corporation, its capital stock, or its shares of stock was prohibited.

The plaintiffs in error answer that they are either a corporation organized under that charter, or else there is no corporation, and the individuals assuming to act as such should be sued in their individual capacity, and, if liable at all for any taxes whatever, they must be liable as individuals only. They further say that the state, by its action herein, recognizes them as a corporation, and, if a corporation at all, they are such under the original charter above mentioned, and, if they be a corporation under such charter, they are entitled to all the rights and privileges and immunities granted by that charter as a whole, and that they cannot be prosecuted as a corporation under that charter for the purpose of compelling them to pay taxes, and, at the same time, be denied the right of exemption from such payment granted by that sixtieth section. They also allege that this action of the state is a collateral attack upon their charter by denying their immunity from taxation, given by its sixtieth section, and therefore calling in question its existence as a corporation, and an action of that kind can only be maintained by the state by means of a quo warranto, either against the corporation itself for the exercise of powers not granted it, or against the individuals for assuming to exercise the corporate powers.

For the purpose of effecting a dissolution of a corporation, grounded upon some alleged forfeiture of its rights and powers, the state must act through its attorney general, and by action in the nature of quo warranto. This is not such an action, and the dissolution of the corporation is not its object. The state, in effect, so far recognizes it as a corporation as to demand payment of taxes on its capital stock, or on its shares of stock, and when, as a defense to that action, the corporation plaintiff in error, or its stockholders, set up its alleged right of exemption under the sixtieth section of the charter, the answer of the state is, "You are not entitled to that exemption, because, at the time your charter was accepted, 24 years after it was granted by the legislature, the constitution of the state prevented the grant of any exemption such as is claimed by you." To which the plaintiffs in error rejoin that, "In this action, you cannot look at the time when the charter was accepted, but, as the corporation is acting under the original charter, the sixtieth section remains in full force."

We think that, even in this action, it is proper for the state to inquire as to the time of the acceptance of the charter, for the purpose of determining what powers were actually granted. If the charter had been accepted, and the individuals organized under it, prior to the adoption of the constitution of 1870, then the exemption might have gone with it; but we think it entirely possible to hold that, by the acceptance of the charter, assuming it to have been within a reasonable time, but after the constitution was adopted, such acceptance (while subsequently recognized by the legislature in permitting it to change its situs) must be taken in connection with the provisions of the constitution existing at the time, and that, while the incorporators might take all the other rights, powers, and privileges granted by the charter, so far as to give them the franchise to be a corporation, and exercise the powers therein granted, the immunity of exemption would not pass under the grant.

It might possibly have been held, in a direct attack of the state upon the charter, that there had been an unreasonable delay in accepting it, and that, consequently, there was in law no corporation under the charter. That course was not taken, and the legislature, after the assumed organization under the charter in 1884, passed an act changing the name of the corporation, and permitting it to change its situs. It might, therefore, be claimed that it thereby recognized the existence of the corporation under the charter, but in subordination to the constitution and laws existing at the time when the charter was accepted.

We think, upon these facts, the exemption from taxation did not pass to the corporation, and the assessments were, in consequence, legal and valid. The judgment is therefore affirmed.[s]

[s] See Lucy C. Farnsworth et al. v. Lime Rock Railway Co., 83 Me. 440, 444, 22 Atl. 373 (1891).

SOCIETY OF MIDDLESEX HUSBANDMEN & MANUFACTURERS v. DAVIS.

(Supreme Court of Massachusetts, 1841. 8 Metc. 133.)

Assumpsit on a promissory note for five dollars, dated October 20, 1824, payable to the plaintiffs, with interest annually. The action was commenced before a justice of the peace, and was carried by appeal into the court of common pleas. In that court, the defendant filed a specification of defence, requiring the plaintiffs to prove their case in legal form, and relied on being able to prove that the note declared on was obtained by false representations, and was given without consideration, or that the consideration, if any, had failed.

The plaintiffs produced an act (St. 1802, c. 94) incorporating "The Western Society of Middlesex Husbandmen," and also the St. of 1819, c. 73, by which it was enacted, that said corporation should thereafter be called and known by the name in which they brought this action. In the first of these statutes were the following provisions: "That every person being a member of the Massachusetts Society for promoting Agriculture shall be considered as an honorary member of the Western Society of Middlesex Husbandmen, and shall have a right to assemble and vote at all meetings thereof;" "that the end and design of the institution hereby incorporated is to promote useful improvements in agriculture;" "that Ebenezer Bridge, Esq., be authorized to appoint the time and place for holding the first meeting of said society, and to notify the members thereof, by publishing the same in one or more newspapers printed in Boston, 14 days at least before the time of such meeting."

The plaintiffs then produced books of records to show the acceptance of said act of 1802, and an organization under it. These books had belonged to an unincorporated association, that had borne the same name from the year 1794. It appeared from the entry in these books, that said association, on the 18th of October, 1802, appointed a committee to petition the legislature for an Act "to incorporate them into a body politic." It further appeared from these books, that on the 25th of April, 1803, the Western Society of Middlesex Husbandmen met at Westford—21 members being present—and voted that the third Monday of the following October should be the day "for holding the first meeting of the society under the incorporating act; to be held at Littleton"; and that the choice of officers for that year should be "deferred to the abovesaid day;" that on the 19th of October, 1803, said society met at Littleton—19 members being present—and chose a president, two vice presidents, two secretaries, four trustees, and a treasurer; that on the 19th of October 1819, the president of the society was appointed "to apply to the legislature to alter the corporate name of the society," so that it

might thereafter be called "The Society of Middlesex Husbandmen and Manufacturers."

The plaintiffs also proved, that from and after the date of the act of 1819, c. 73, the recording secretary uniformly designated the society by the name given to it by that act.

Abel Moore, the subscribing witness to the note in suit, testified that he procured the defendant to give said note, and that it was given on his representation, that by giving it, the defendant would become a member of the corporation, and that the note would constitute a part of the capital or fund of $3,000, which the corporation wished to raise, in order to entitle it, as an agricultural society, under St. 1818, c. 114, to draw from the treasury of the Commonwealth $200 for each $1,000 raised, as a fund or capital, by the corporation; and that there was no other consideration for the note.

It was proved that the plaintiffs had, at the time of the trial, about $1,770 in notes of $5 each, and a like amount in other funds and stocks, and that, by virtue thereof, their secretary had drawn from the treasury of the Commonwealth $600 each year since 1824.

To show that the defendant became a member of the society by giving this note, the plaintiffs introduced the following vote from their records and by-laws, adopted September 27, 1819: "Any gentleman, paying to the treasurer the sum of five dollars, shall thereby become a member of the society during his lifetime, and be entitled to all the privileges and benefits, as such, without any other assessment whatever."

The defendant objected that the records, which were produced, did not show an acceptance or adoption by the plaintiffs of the original act of incorporation, or of the act of 1819, changing the name of the corporation; that there was no evidence that the first meeting was called agreeably to the requisition of the incorporating act; and that the corporation never was organized according to that act. He further objected, that the note was given without consideration, because he did not, by giving it, become a member of the corporation and because it did not constitute a part of such a fund as by the true construction of St. 1818, c. 114, authorized an agricultural society to draw money from the treasury of the Commonwealth: That the note was obtained by mistaken and false representations and was therefore void.

These objections were overruled, and the case was brought into this court upon exceptions.

WILDE, J.[4] Two objections have been urged by the defendant's counsel to the plaintiffs' right of action, upon the facts proved at the trial. The first is, that there is no sufficient evidence of the plaintiffs' acceptance of their act or charter of incorporation, granted in 1803, or of their legal organization according to the provision of

[4] Part only of the opinion is given.

that act, or of their acceptance of the additional act of 1819, c. 73. The second objection is, that the note in suit was given without consideration, and was obtained from the defendant by the misrepresentations of the plaintiffs' agent.

As to the first objection, it is true that it does not appear by the records of the society that the act of incorporation has been accepted by an express vote to that effect; nor does it appear in what manner the first meeting of the corporation was called. But the presumptive proof, both of the acceptance of the act of incorporation, and of the legal organization of the society, is exceedingly strong, and quite as satisfactory as direct evidence. That such presumptive evidence is admissible and proper is fully maintained by the decisions in Dedham Bank v. Chickering, 3 Pick. 335, and in Bank of United States v. Dandridge, 12 Wheat. 71, 6 L. Ed. 552, and by the numerous authorities cited in the latter case. By these authorities it is now well settled, whatever may have been the ancient doctrine as to corporations, that as the acts of private persons, even of the most solemn nature, may be presumed, or proved by presumptive evidence; so as to the acts of a corporation, if they cannot be reasonably accounted for but on the supposition of other acts done to make them legally operative and binding, they are presumptive proofs of such other acts. Thus, as deeds and grants to private persons, which are beneficial to them, are presumed to have been accepted, so also may the acceptance of an act or charter of incorporation, beneficial to the corporation be presumed, for the like reason. And a long lapse of time, and the continued exercise of the corporate powers granted to a corporation, sufficiently justify the presumption of the acceptance of the charter. So if a particular charter is applied for, and it is granted, the acceptance may be presumed from such previous application.

All these grounds of presumption seem to concur in the present case; and we think, therefore, that the presumptive proofs of the acceptance of the act of incorporation, and the organization of the society, are full and satisfactory. * * *[5] Judgment for the plaintiffs.

[5] Accord, City of Atlanta et al. v. Gate City Gaslight Company, 71 Ga. 106, 116 (1883).

In Talladega Insurance Co. v. Landers, 43 Ala. 115, 136 (1869), the court said: "As a general proposition it is true that the charter of a corporation must be accepted, but in cases of private corporations like these under consideration, created for individual benefit, the presumption is that they are created at the instance and on the request of the parties to be benefited thereby, and, consequently, are accepted by them. If, therefore, they are found exercising privileges granted, it will be almost conclusive evidence of the fact of acceptance."

SMITH v. SILVER VALLEY MINING CO. et al.

(Court of Appeals of Maryland, 1885. 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760.)

Appeal from the Circuit Court of Baltimore City.

The facts are stated in the opinion of the Court.

MILLER, J.,* delivered the opinion of the Court.

The charter of the "Silver Valley Mining Company" was granted by the Legislature of North Carolina by an Act which was ratified on the 15th of February, 1861.

The title of this statute is "An Act to Incorporate the Silver Valley Mining Company, in the County of Davidson." By the first section it is enacted that five named persons and "their associates, successors, and assigns, be and they are hereby created and constituted a body politic and corporate, by the name and style of the Silver Valley Mining Company, for the purpose of working, mining, and exploring for silver, gold, copper, iron and all other metals and minerals, and for mining, rending, smelting and working the same, and by that name may sue and be sued," "may have a common seal, and may enjoy all the privileges and powers incident to mining or smelting corporations, and may also purchase, hold and convey any real or personal property or estate as capital stock, to the amount of one million of dollars."

The second section provides "that the said corporation may divide their stock into such number of shares, and may provide for the sale and transfer thereof in such manner and form as said corporation shall from time to time deem expedient, and may levy and collect assessments, forfeit and sell delinquent shares, declare and pay dividends on the shares, and may make, alter and repeal such by-laws and regulations as said corporation may deem necessary, not repugnant to the laws of this state and of the United States." * * *

The appellant by his bill in this case filed in February, 1880, avers that in March, 1869, he became the holder of a certificate which justly and legally entitled him to the ownership of 1800 shares of the capital stock of this corporation, each of greater value than one dollar, and his complaint is that at a meeting of the directors held in Baltimore in February, 1879, a resolution was passed imposing an assessment of two cents a share, and declaring that if this was not paid before the 31st of March following, the stock on which it was not paid should be forfeited to the corporation and sold for its benefit, and that his stock was under this assessment declared forfeited, and the form of a sale thereof had. He charges that the directors had no right to hold a meeting for this purpose out of the state of North Carolina, and that their proceedings in the premises were wholly void; that he had no notice of the proceedings of this meet-

* A part of the recitals in the bill is omitted.

ing until many months afterwards, though he was and has been for many years a resident of Baltimore, and that the directors and other authorities of the corporation did not wish their said proceedings to be known by him; that no suitable or effective means were taken to give notice thereof even by advertisement in the public papers, the same having been, as he is informed, published in a paper which he does not take and very seldom sees; that the pretended sale of his stock was made to Wilkins, the president, and Denison, the treasurer of the corporation, and that these pretended proceedings of forfeiture were carried out by their influence, co-operating with other persons who are unknown to him; that shortly after these proceedings came to his knowledge, he made, through his counsel, a formal tender to the president of the amount of the assessment with interest thereon, and demanded to be reinstated in the possession and enjoyment of his stock, but this demand was refused; that all these proceedings purporting to forfeit his stock are merely illusory, have been carried out for the benefit of Wilkins and Denison, officers of the corporation as aforesaid, and that they are not only void in law by reason of holding the meeting beyond the limits of the state which granted the charter, and by reason of the attempt to deprive him of his property without notice in contravention of the first principles of justice, and of the organic law of the State of North Carolina, as it existed at the time this corporation was chartered, but that they are by reason of the facts above stated, inequitable, unjust and in fraud of his rights.

The bill then prays that the company and Wilkins and Denison may severally answer under oath, and set forth explicitly and fully the proceedings whereof the forfeiture of his stock is alleged to have occurred, and may discover when, by whom, and to whom it was sold and at what price, who is now the holder or ostensible holder thereof, * * * that the supposed forfeiture and sale may be annulled, that he may be reinstated in the possession and enjoyment of his said stock, that the said company and Wilkins and Denison may be forever enjoined and prohibited from setting up this supposed forfeiture, and from claiming any benefit therefrom, and that he may have full and fair compensation from them on account of the premises, and for general relief.

All the defendants filed a demurrer to the bill, which was overruled. They then filed separate answers in which they put the complainant upon proof of his ownership of stock, deny all the charges of combination or fraud, set out the proceedings under which the forfeiture and sale were made, and insist that the same were duly and lawfully conducted, and are legal and valid. Proof was then taken, and upon the hearing the Court below passed a decree dismissing the bill, and from that decree this appeal is taken.

It thus appears that one of the grounds upon which the bill as-

sails the validity of the forfeiture, is that the meeting of the directors at which the proceedings to that end were adopted, was not held within the limits of the sovereignty granting the charter, but another question is presented, and this goes to the corporate existence of this company at the time the appellant became a holder of its stock. The mere grant of a charter like this, where it does not appear upon the face of the incorporating act, or otherwise, that the named corporators applied for it, does not create the corporate body. Something more must be done. There must be at least an acceptance of the grant by a majority of the corporators, before corporate life and existence can begin. Angell and Ames on Corp. (11th Ed.) § 81; Morawetz on Private Corp. §§ 14, 17; Boone on Corp. § 23. Nor is this a case in which acceptance is to be presumed or inferred from the assumption and exercise of the corporate powers,[7] for the proof clearly shows when, where, and how this charter was accepted. The testimony is explicit and without contradiction, that the named corporators held their first meeting in the City of Baltimore on the 5th of March, 1861, less than a month after the passage of the Act, and that on the next day (March 6, 1861) they accepted the charter at a meeting held by them at the same place. It also appears that at the same time or shortly thereafter, they elected a president, secretary and treasurer, adopted a seal, determined upon the number and par value of the shares of capital stock, and in fact did everything pertaining to the organization of the company, at meetings held by them at the same place. In short, the proof is direct and positive, that no official meeting either of the corporators, stockholders or directors was ever held in North Carolina until the spring of 1882, nearly two years after this bill had been filed. In view of the fact that all these corporate acts are thus clearly proven to have been done out of the State granting the charter, the question arises as to their validity and the consequent legal existence of this corporation in March, 1869, when the appellant purchased his stock. This question is as directly presented under the averments of the bill and answers in this case, as it ever can be in a civil suit. Legal ownership of the stock which is the foundation of the relief prayed is alleged in the bill, and not admitted by the answers. What then is the law upon this subject?

It seems to be well settled, by the weight of authority, that directors may hold meetings, have an office, make contracts, and transact a part at least of the general business of the corporation in another state, unless prohibited by local legislation. But the directors when so acting are not the corporate body, but its mere agents. Angell & Ames on Corp. § 104; Balt. & Ohio R. R. Co. v. Glenn et al., 28 Md. 287, 92 Am. Dec. 688. Nor do we think it makes any differ-

[7] See Trustees of School District No. 3 in Blandford v. Gibbs, 2 Cush. (Mass.) 39 (1848).

ence, as to the operation of this rule, that the named corporators, as in this case, are empowered by the charter to manage the affairs of the corporation, and to exercise all such rights as the charter grants, "as directors" until others are elected. The two capacities of corporators and directors are distinct, and they cannot do in the latter those acts which the law requires them to do in the former capacity. We find nothing in this charter which dispenses with the necessity of its acceptance, and of organization under it, by them as corporators, and certainly nothing which authorizes them, even if the grant of such authority would in any case be valid, to do these acts in another state. But while the directors may thus act as agents of the corporation it has, ever since the decision of the Supreme Court in the case of Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274, been the recognized rule of American law, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is enacted; that it exists by force of the law, and where that ceases to operate the corporation can have no existence; that it must dwell in the place of its creation and cannot migrate to another sovereignty; and that it cannot hold meetings, pass notes, or do any corporate acts strictly so-called outside of that sovereignty. Angell & Ames on Corp. § 104; Green's Brice's Ultra Vires, 442, note a; Boone on Corp. § 66. * * **

GLYMONT IMPROVEMENT & EXCURSION CO. v. TOLLER.

(Court of Appeals of Maryland, 1894. 80 Md. 278, 30 Atl. 651.)

Action by the Glymont Improvement & Excursion Company against Washington N. Toller to compel defendant to accept stock in plaintiff company in exchange for stock in a company which plaintiff succeeded. Decree for defendant. Plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, MCSHERRY, FOWLER, BRISCOE, PAGE, and BOYD, JJ.

ROBINSON, C. J.[9] The Upper Glymont Improvement & Excursion Company was incorporated in 1883 under the general incorporation law, with a capital stock of $25,000, divided into 1,000 shares, of the par value of $25 each. The object of its incorporation was to buy a tract of land on the Potomac river at or near Glymont, in Charles county, about 20 miles below Washington, and to erect thereon hotels, cottages, and other buildings necessary and suitable for a summer resort; also for the purpose of cultivating flowers, growing vegetables, and agricultural products.

[8] Compare Heath v. Silverthorn Mining & Smelting Co. et al., 39 Wis. 146 (1875).

[9] The statement of facts is omitted. Part only of the opinion is given.

Soon after its organization the company bought a tract of land called "Upper Glymont," and then it bought another tract, "Lower Glymont," the two tracts containing about 1,000 acres. On the property thus purchased it has expended large sums of money in buildings and other improvements, in order to make it an attractive summer resort. After the purchase of the Lower Glymont tract, it was deemed advisable to change the name of the company, by leaving out the word "Upper," thus making the name "The Glymont Improvement & Excursion Company"; and also to strike out the clause in the charter forbidding the sale of intoxicating drinks on the property; and for this purpose an amended charter was prepared by Toller, the defendant, then one of the directors, and was acknowledged by him and six other corporators, as required by the Code, before the proper officer, and submitted by him to the stockholders at a special meeting held 20th May, 1886.

It does not appear that any definite action was had in regard to the amended charter at this meeting, but at a meeting of the directors, June 10th of the same year, the committee on charter reported that they had submitted the amended charter to Judge Stone, one of the judges of the circuit court, as required by the Code, and that he, while being of opinion that the amendments were in conformity with the statute, suggested it might be better to adopt a new charter, and this suggestion was concurred in by the directors. Instead, then, of amending the charter, articles of incorporation were signed by the directors for the incorporation of "The Glymont Company," and, having been duly acknowledged by the parties signing the same, they were submitted to Judge Stone, who thereupon certified they were in conformity with the provisions of the law authorizing the formation of said corporation; and on the 17th March, 1888, they were filed for record in the clerk's office of the circuit court for Charles county.

This charter, which is called the "new charter," is identical in terms and provisions with the amended charter prepared, signed, acknowledged, and submitted by the defendant at the stockholders' meeting of May 20th, and it is substantially the same as the charter of 1883, the only alterations being in the name of the company and the omission of the clause forbidding the sale of intoxicating drinks. The reason for filing new articles of incorporation, instead of an amended charter, was the fact that the whole capital stock had not been taken, and it was deemed best to avoid any trouble that might arise under section 64 of article 23 of the Code, which provides that the capital stock of a corporation shall be paid within four years from and after its incorporation, "or such corporation may be dissolved."

After the articles of incorporation had been filed of record, a special meeting of the stockholders was called, to be held April 7, 1888, at Glymont, where the principal office of the company was located;

and at this meeting the charter, after full consideration, was adopted, without a dissenting vote, more than two-thirds of the shares of stock having been voted. And in adopting the charter it was further resolved: "That the trustees are hereby authorized and instructed to convey the land and all its betterments and improvements to the Glymont Improvement & Excursion Company, provided said company shall assume all the debts and liabilities whatsoever of the Upper Glymont Improvement & Excursion Company, and agree to issue to each stockholder of this company certificates of stock in the new company equal to the amount of paid-up stock owned by him in the old company." There being only two charter members of the new company present, the meeting adjourned to meet at the branch office in Washington on the 9th April. At this adjourned meeting, held in Washington, the directors formally organized by electing a president and other officers.

The defendant was the owner of 64 shares of stock of "The Upper Glymont Company," and he refuses to exchange this stock for the stock of "The Glymont Company," because the charter of 1888, he says, has never been accepted, and the latter company has no power therefore to issue certificates of stock; and, secondly, because it has no right to compel him, a dissenting stockholder, to exchange his stock for the stock of that company.

The acceptance of the charter is necessary, of course, to the corporate existence of every corporation, and for the reason that the corporators are not obliged to assume the responsibilities and discharge the duties imposed by the charter without their consent. It is well settled, however, that it is not necessary, even when the charter is granted by special act of the legislature, to prove such acceptance by a formal vote of the corporators; on the contrary, it may be inferred from the exercise of corporate acts by them under the charter.

In this case, however, we are not dealing with a charter granted by a special act of the legislature, but one created under the general incorporation law; and this law provides, in the first place, that any five or more persons "* * * who may desire to form a corporation * * * shall make, sign, seal, and acknowledge before some person competent to take the acknowledgment of deeds, a certificate in writing in which shall be stated," etc. And then it provides that it shall be the duty of the persons executing the same to submit it to one of the judges of the judicial circuit within which the principal office shall be located, in order that he may determine whether the certificate is in conformity with the law, "and if he shall so determine, he shall certify his said determination upon said certificate, which shall thereupon be recorded in the office of the clerk of the circuit court for the county in which the principal office of said corporation shall by the terms of the certificate be located." And then

it further provides "that when the said certificate shall have been recorded, the persons who have signed and acknowledged the same and their successors, shall according to the objects, purposes, articles, conditions and provisions in said instrument contained, become and be a body politic and corporate in fact and in law, by the name stated in such certificate."

So, upon compliance with these provisions, the persons who have signed and acknowledged the articles of incorporation thereby become a corporate body, by the name stated in the articles. It would be idle, under such circumstances, to require further proof that the corporators had accepted that which they had in express terms applied for, and to obtain which they had complied with all the requirements of the law.

But then, it is said, there must not only be an acceptance of the charter, but the company must be organized in the state where the charter was granted; and the argument is that, inasmuch as the plaintiff company was organized by the directors in Washington on the 9th April, 1888, there is no proof of their acceptance of the charter and organization of the company in this state. To this we cannot agree. There is abundant proof throughout this record of the acceptance and organization of the company in this state, independent altogether of the organization in Washington. It shows that from 1888, when the company was incorporated, down to the filing of this bill, in 1892, the corporators and their successors have exercised corporate rights of every kind under the charter; that they have issued certificates of stock under the seal of the company; that they have expended money in further developing and improving the property; and that a board of directors has been annually elected by the stockholders at Glymont, in this state, and that the directors thus elected have controlled and managed all the property and affairs of the company. * * *

Decree reversed, and cause remanded, in order that a decree may be passed as prayed.[10]

[10] Accord: D. W. C. Benbow v. J. C. Cook, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454 (1894).

SECTION 2.—EFFECT OF FAILURE TO COMPLY WITH THE STATUTE—DE FACTO CORPORATIONS

FINNEGAN v. KNIGHTS OF LABOR BLDG. ASS'N et al.

(Supreme Court of Minnesota, 1893. 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552.)

GILFILLAN, C. J.[11] Eight persons signed, acknowledged, and caused to be filed and recorded in the office of the city clerk in Minneapolis, articles assuming and purporting to form, under Laws 1870, c. 29, a corporation, for the purpose, as specified in them, of "buying, owning, improving, selling, and leasing of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the construction and leasing of a building in the city of Minneapolis, Minn., as a hall to aid and carry out the general purposes of the organization known as the 'Knights of Labor.'" The association received subscriptions to its capital stock, elected directors and a board of managers, adopted by-laws, bought a lot, erected a building on it, and, when completed, rented different parts of it to different parties. The plaintiff furnished plumbing for the building during its construction, amounting to $599.50, for which he brings this action against several subscribers to the stock, as copartners doing business under the firm name of the "K. of L. Building Association." The theory upon which the action is brought is that, the association having failed to become a corporation, it is in law a partnership, and the members liable as partners for the debts incurred by it.

It is claimed that the association was not an incorporation because (1)—First, the act under which it attempted to become incorporated, to wit, Laws 1870, c. 29, is void, because its subject is not properly expressed in the title; second, the act does not authorize the formation of corporations for the purpose or to transact the business stated in the articles; third, the place where the business was to be carried on was not distinctly stated in the articles, and they had, perhaps, some other minor defects.

It is unnecessary to consider whether this was a de jure corporation, so that it could defend against a quo warranto, or an action in the nature of quo warranto, in behalf of the state; for, although an association may not be able to justify itself when called on by the state to show by what authority it assumes to be, and act as, a corporation, it may be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the

[11] A part of the opinion is omitted.

lawfulness of its organization. Such is what is termed a corporation de facto,—that is, a corporation from the fact of its acting as such, though not in law or of right a corporation. What is essential to constitute a body of men a de facto corporation is stated by SELDEN, J., in Methodist, etc., Church v. Pickett, 19 N. Y. 482, as "(1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law." This statement was apparently adopted by this court in East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260; but, as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in Taylor on Private Corporations (page 145) is more nearly accurate: "When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation cannot be questioned collaterally."

To give to a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a de facto corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in Johnson v. Corser, 34 Minn. 355, 25 N. W. 799, in which it was held that what had been done was ineffectual to limit the individual liability of the associates. They had not gone far enough to become a de facto corporation. They had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required.

"Color of apparent organization under some charter or enabling act" does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation de jure. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto. * * * Judgment affirmed.

DAVIS et al. v. STEVENS et al

(District Court, D. South Dakota, S. D., 1900. 104 Fed. 235.)

CARLAND, District Judge.[12] On March 21, 1900, John Davis, Wayne Mason, and William C. Harris, who are creditors of the Bank of Plankinton in a sum exceeding $500, and who are citizens of the state of South Dakota, filed a petition in this court praying that the Bank of Plankinton be adjudged bankrupt, as a private banking institution, and a co-partnership consisting of the above-named defendants. In due time all of the above defendants answered said petition, except the defendant Fred L. Stevens, who, after due service, has not appeared in this action. In their answer defendants deny generally the allegations of the petition, and, further answering, allege that the Bank of Plankinton was during the times alleged in the petition, and now is, a corporation duly organized under the laws of the territory of Dakota and the state of South Dakota. The defendant Charles A. Johnson admits that he was a stockholder in said corporation prior to May, 1898, but on the 9th day of May in said year he sold and transferred all his stock and interest in said corporation, and since said time has had no connection with the business of said corporation. The defendant Bartow admits that he owned one share of stock in said corporation, but sold it on or about the month of June, 1899. The defendant Francis G. Fox is shown by the testimony to have been a stockholder in the corporation for about 10 years last past.

It appears from the testimony and admission of the parties to this proceeding that the petitioners are creditors of the Bank of Plankinton in a sum exceeding $500, and that on the 27th day of November, 1885, articles of incorporation, duly signed and acknowledged by Edwin S. Rowley, Fred L. Stevens, Charles A. Johnson, Joseph D. McCormick, and William M. Smith, were duly filed in the office of the secretary of the territory of Dakota, wherein it was stated that the business of the proposed corporation, which was to be called the Bank of Plankinton, should be a general banking, real-estate, and loan business. Upon the filing of said articles there was issued by the secretary of the territory of Dakota a certificate of corporate existence to the parties above named, wherein it was certified that said parties, their associates and successors, had become a body politic and corporate under the corporate name of Bank of Plankinton, and by that name had a right to sue and be sued, purchase, hold, and convey real and personal property, and to have and enjoy all the rights and privileges granted to a private corporation under the laws of this territory, subject to their articles of incorporation, and all legal restrictions and liabilities in relation thereto. It further appears

[12] Part only of the opinion is given.

from the testimony and the pleadings in the case that the Bank of Plankinton did business as a banking corporation from the time of its alleged incorporation until on or about the 10th day of January, 1900, when it closed its doors and ceased to do business; the business of the bank being transacted at Plankinton, Aurora county, in this state.

It is claimed by the petitioners that, as there was no law of the territory of Dakota which authorized the incorporation of individuals to do a banking business, the defendants in this proceeding, who are alleged to have owned stock in this corporation, were simply partners, and as such were doing business as a private bank, and thus subject to be adjudicated a bankrupt as a private bank. It is contended by the defendants that whether or not the Bank of Plankinton was a corporation cannot be inquired into collaterally, and that the state of South Dakota is the only power which could, by proceedings in the nature of a quo warranto, inquire into the legal organization of this corporation.

If the Bank of Plankinton was a de facto corporation, this position would be unassailable. But, in order that there may be a de facto corporation, it must have been possible for the territory of Dakota to have chartered a de jure corporation, and as there was no law of the territory of Dakota permitting the incorporation of banking corporations at the time the Bank of Plankinton received its certificate of corporate existence, it results that there cannot be a de facto corporation. The limitation of the doctrine that the validity of corporate existence cannot be litigated collaterally is that, where there is no law under which a corporation might exist, then the validity of corporate existence may be attacked collaterally. Heaston v. Railroad Co., 16 Ind. 275; Krutz v. Town Co., 20 Kan. 397; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; 1 Thomp. Corp. § 505. * * *

Defendants invoke section 2892 of the Compiled Laws of Dakota, which is in the following language: "The due incorporation of any company claiming in good faith to be a corporation under this chapter and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party, but such inquiry may be had and action brought at the suit of the territory in the manner prescribed in the Code of Civil Procedure."

This section, as I understand it, simply declares the law in the same manner that the courts declare it. It presupposes that there is a de facto corporation, which cannot exist if there could have existed no de jure corporation. In the case of Oroville & V. R. Co. v. Supervisors of Plumas Co., 37 Cal. 354, it was held by the supreme court of California that a similar provision in the laws of that state did not go to the extent of precluding private persons from denying the existence de jure or de facto of the alleged corporation. In sec-

tion 506, 1 Thomp. Corp., it is stated: "The simple and true view is that if men undertake to form themselves into a business company which the state cannot recognize as a corporation, or which is even forbidden by the state, and in that character contract debts which would be valid and enforceable if contracted by individuals, the courts of justice should hold them liable as partners. It is intolerable that A., B. & C., by merely assuming a corporate name and pretending to be a corporation, can incur with innocent members of the public obligations which would be valid if incurred by them individually, and then escape liability because the law forbids them to act as a corporation in the incurring of such obligations. A simple rule, and one which should apply to all cases, is that, where the obligations of a pretended corporation are neither inequitable nor immoral, the judicial courts should enforce them against the corporations as partners. So to do would be strictly consonant with public policy, because, if business adventurers learn that, unless their corporate organization is lawful and valid they are liable as partners, this will deter them from attempting to form illegal or prohibited corporations."

As the claims of the creditors who are petitioners in this action arise from simply depositing money with the Bank of Plankinton, there is no such relation between the bank and the creditors as would allow the principle of estoppel to be urged. I, therefore, am of the opinion that the parties interested in the Bank of Plankinton were co-partners. * * * Petition dismissed.[13]

PER CURIAM. For the reasons given in the foregoing opinion, said judgment and order are affirmed.

BRANDENSTEIN v. HOKE et al., (BRANDER, Intervener.)

(Supreme Court of California, 1894. 101 Cal. 131, 35 Pac. 562.)

GAROUTTE, J.[14] The defendants other than George L. Brander, an intervener, are the supervisors of the county of Sutter, and, as such, are ex officio members of and constitute the board of reclamation fund commissioners of levee district No. 5. The plaintiff is the holder of certain bonds of said district, which were issued and sold for the purpose of securing funds to carry on improvements in such levee district. A writ of mandate is prayed for, requiring said board of fund commissioners to take certain steps provided in the statute looking towards the levy and collection of a tax upon the property

[13] The petition was denied on grounds discussed in the omitted portion of the opinion. State v. Stevens, 16 S. D. 309, 92 N. W. 420 (1902); Mason v. Stevens, 16 S. D. 320, 92 N. W. 424 (1902).

[14] Facts stated in the opinion, and a part of the opinion omitted.

within the limits of the district, to be applied in liquidation of the principal and interest of plaintiff's bonds.

[The court, after holding the act under which the levee district was organized to be unconstitutional, proceeds:]

It is claimed that this levee district is at least a corporation de facto, and that defendants will not be allowed to set up the unconstitutionality of the law under which it was organized for the purpose of defeating this proceeding; and Dean v. Davis, 51 Cal. 406, is relied upon to support this doctrine. That case does not extend to the limits insisted upon. While it is true that the regularity of the proceedings taken in the organization of a corporation cannot be questioned collaterally, still that principle does not arise in this case. This is not a question of regularity of proceedings. The matter here presented is, was there any law whatever under which a corporation similar to this so-called "levee district" could be organized at all? If there is no such law, then there is neither fund commissioners nor corporation, and a void law is no law. It is said in Norton v. Shelby County, 118 U. S. 442, 6 Sup. Ct. 1125, 30 L. Ed. 178: "An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

It is also insisted that respondents are estopped from disputing the validity of the bonds by retaining the benefit derived from the proceeds of their sale, and also by the payment of interest upon them for several years. We cannot assent to this view. It might possibly have some weight if the district was a corporation organized under a valid law, and these bonds were issued ultra vires, although the principles declared in Sutro v. Pettit, 74 Cal. 332, 16 Pac. 7, seem to negative such contention. But here the principle cuts underneath all mere questions of irregularity of organization, or even the ultra vires issuance of bonds, for there is no organized body or person or persons against whom to urge a waiver or plead an estoppel. It is ordered that the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.[16]

BERGERON v. HOBBS et al.

(Supreme Court of Wisconsin, 1897. 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85.)

Action by J. A. Bergeron against A. A. Hobbs and others. From a judgment on a verdict directed for plaintiff, defendants appeal.

The defendants, under the name of Bayfield Agricultural Association, employed several persons to perform labor in improving their grounds and in erecting fences and buildings. Time checks given by

[16] Compare: Smith v. Sheeley, 12 Wall. 358, 20 L. Ed. 430 (1870).

the defendants to such laborers, for such labor, were assigned to the plaintiff, who brings this action to recover their amount, alleging that the defendants were a co-partnership. The defendants alleged that they were members of a corporation, and denied that they were co-partners, or liable as such. This was the issue which was tried. It appeared upon the trial that articles of organization of the defendants as the Bayfield County Agricultural Association, and a certificate showing the election of officers, had been recorded in the office of the register of deeds of Bayfield, but were not on file there. They had been deposited, with instruction to record and return them, which had been complied with. When the testimony of both sides was in, the court directed a verdict for the plaintiff for the amount of the time checks. From a judgment on that verdict the defendants appeal.

NEWMAN, J. (after stating the facts). There are two questions raised on this appeal: (1) Was the mere recording of the articles of incorporation, with the certificate of the election of officers, without the intention or fact of the papers themselves remaining in the office, a sufficient compliance with the statute, so that the organization of the corporation became complete, as upon a proper filing of the papers themselves? And (2) if the recording was not sufficient for that purpose, are the defendants liable to the plaintiff only as a de facto corporation, or are they liable as co-partners?

1. The statute (section 1460, Rev. St.) provides that, upon the filing of "a certificate of organization, * * * with a copy of the constitution, * * * in the office of the register of deeds of the county, such society shall have all the powers of a corporation, necessary to promote the objects thereof." It cannot be doubted that the filing of the proper papers in the proper office is made, by the statute, a condition precedent to the vesting of corporate powers. The court may not be able to clearly define the respect wherein the mere recording and removal of the papers from the office fails to serve the full purpose which the legislature intended to accomplish by the filing of them. The legislature, no doubt, had good and sufficient reasons for its choice of means to promote its purpose. For the court it is not a question of equivalents. A literal filing of the papers is necessary because it is so written in the law. The term "filing" and the verb "to file," as related to this subject, include the idea that the paper is to remain in its proper order on file in the office. A paper is said to be filed when it is delivered to the proper officer, and by him received, to be kept on file. Bouv. Law Dict. The statute is plain and easy of observance. Valuable rights and exemption from personal liability are to be secured by its observance. It is no undue severity to require its strict observance. The defendants had not observed it, and had not secured corporate powers.

2. Had the defendants secured immunity from individual liability? No doubt, as a general rule, where an attempt to organize a corporation fails, by omission of some substantial step or proceeding required by the statute, its members or stockholders are liable as partners for its acts and contracts. Beach, Priv. Corp. §§ 16, 162b; 1 Thomp. Corp. §§ 239, 416, 417. But the defendants' contention is that they are not within this rule, because they are, at least de facto, a corporation, and their right to be a corporation cannot be inquired into in a collateral action, but only in a direct action for that purpose by the state. The infirmity of the defendants' contention is in the assumption that they are, de facto, a corporation. In order to secure this immunity from inquiry into its right to be a corporation in a collateral action, its action, as a corporation, must be under a color, at least, of right. It is immaterial that they have carried on business under the supposed authority to act as a body corporate, in entire good faith. If they had not color of legal right, they have obtained no immunity from individual liability for the debts of the supposed corporation. Until the articles of incorporation are filed in the office of the register of deeds of the county, there is no color of legal right to act as a corporation. The filing of such paper is a condition precedent to the right to so act. So long as an act, required as a condition precedent, remains undone, no immunity from individual liability is secured. 1 Thomp. Corp. §§ 226, 508.

The defendants are not a corporation either de jure or de facto, but are liable for the plaintiff's claim, as partners. It was not necessary to prove a co-partnership by evidence. That was established by implication of law. Nor was it necessary to prove that the debt was unpaid. There was no presumption that it had been paid to be rebutted. The judgment of the circuit court is right, and must be affirmed. The judgment of the circuit court is affirmed.

MARSHALL, J.[16] (dissenting). With the decision that the defendants failed to comply with all the conditions precedent to the corporate existence of the agricultural association I concur, but from the decision that because of such failure such association was not a corporation de facto I respectfully dissent; hence dissent from the conclusion reached that the defendants are personally liable to plaintiff, and that the judgment should be affirmed, but, on the contrary, hold that it should be reversed.

My brethren cite Beach, Priv. Corp. § 162b, and 1 Thomp. Corp. §§ 239, 508, to the effect that, unless all the conditions precedent to the creation of a corporation are performed, there can be no corporation in fact, and that the members of the pretended corporation will be personally liable. Then sections 417 and 420 of Judge Thompson's work are cited, to the effect that, if the corporation

[16] Part of the dissenting opinion, consisting largely of an exhaustive examination of authorities, has been omitted.

never comes into being in fact, so as to be regarded as a corporation de facto, the persons who have assumed to contract in its name are personally liable. These sections seem to be tied together, in the opinion of the court, as if the two ideas are in harmony, when the contrary, to my mind, is manifestly true. Thompson treats this subject in such a way as to naturally confuse one who attempts to follow him as authority. After saying, in sections 239, 508, in effect, that all the conditions precedent to the creation of a corporation must be complied with, in order that the members may escape personal liability, he says, in section 417, that the rule does not apply to corporations de facto, and in section 420 that where there is a corporation de facto,—in other words, where the circumstances are such that a corporation might exist, and where the party seeking to charge the members individually has dealt with them as a corporation,—he is estopped from setting up the fact that they are not a corporation de jure, in order to charge them personally. From this confusion it is not to be wondered at that if a person tries to follow Judge Thompson he will be led inevitably into the position of holding that, unless all the conditions precedent to the existence of a corporation are complied with, personal liability of the members of the corporation will exist, though the rule does not apply if the organization be a corporation de facto. That comes from trying to harmonize conflicting decisions, that proceed on theories so opposite that harmony is impossible.

If we hold with Missouri, Arkansas, and some other states, that unless all the steps necessary to the creation of the corporation have been taken there is no corporate existence, and that the members of the association are personally liable, we, in effect, say that it is not sufficient to enable such members to escape personal liability to show that their organization is a corporation de facto; that nothing short of a corporation de jure will do. But if we adopt the growing doctrine, supported, as we shall show, by the overwhelming weight of authority in this country, that a person who contracts with a de facto corporation, the members of the latter and such person believing, in good faith, in its legal existence, such members cannot be held personally liable, then we concede, necessarily, that it is not essential to freedom from such liability that all the statutory requisites to the existence of a corporation be complied with, because, when that is done, the organization, obviously, is not a corporation de facto only; it is a corporation de jure. This is too plain to admit of serious discussion.

While the decision in this case, as I read the opinion of the court, in one view, goes upon the ground that the members of a de facto corporation are not responsible personally, inasmuch as it may be held that the decision really is to the effect that personal liability exists because all the conditions precedent to a corporation de jure were

not complied with, some reference to authorities on the subject of whether to escape such liability it is necessary that the corporation exist in fact may be proper.

The development of the law on this subject has been rapid in recent years in the direction of holding that the state only can challenge the legality of the exercise of corporate powers. The ancient doctrine was that all contracts made by a corporation in excess of its powers were void. That has not been changed, but the doctrine has grown up, and become well-nigh universal, that the state only can raise the question by proceedings to punish the corporation.

Our court is fully committed to such doctrine. John V. Farwell Co. v. Wolf, 70 N. W. 289. Following closely upon the growth of such doctrine, as applied to transactions in excess of corporate powers, where there is no question as to the existence of the corporation, it has been extended, so as to prevent private persons, who have contracted with a de facto corporation, from questioning its existence; holding that sovereign power only can raise that question. This court having fully adopted the doctrine where there is a corporation in fact, how it can be rejected where the corporation is de facto merely is not perceived, inasmuch as a controlling reason for it in the one case applies equally to the other. In both cases there is an exercise of powers that can only be lawfully exercised by sovereign authority; hence the unauthorized exercise of power constitutes a public offense, not against any individual, but against the sovereignty of the state. * * *

From the foregoing, we are warranted in asserting that, by well-settled principles of law, the agricultural association with whom plaintiff contracted was a de facto corporation. Every element necessary to make it such appears clearly by the record. There was a law under which it might have existed. The association prepared their constitution, and adopted it in the form of ordinary articles of organization, under the general incorporating act, and by mistake they filed it for record, and it was recorded and returned, instead of filing it to be left in the office, as the law requires. They supposed that they had corporate existence by reason of the recording of their articles of organization. They assumed to act as a corporation, and exercised corporate powers for a considerable length of time, and, for aught that appears, in the utmost good faith. Certainly, the existence of the law, the making and recording of articles of organization, in an honest attempt to become a corporation, and the honest assumption and exercise of corporate powers, prima facie establishes good faith. Plaintiff supposed that the corporation was a corporate body till long after his contract relations with the association ceased. Now to allow him to come in and say that the corporation did not exist which all supposed had legal existence; that, though the officers of the association and plaintiff contracted for

a corporate liability on the part of the former, it shall be held, nevertheless, that the members of such association are bound as partners, in direct violation of the well-settled law that such an association, under the circumstances, was a de facto corporate body; that, as between the parties, the relations are the same in all respects as though the corporation had a de jure existence, and contrary to the settled doctrine, as I believe, of this and most other courts,—is what the judgment in this case does, in my opinion.

I think the judgment of the circuit court, holding the defendants liable as partners, was wrong, and that it should be reversed, and the cause remanded for a new trial.

OWENSBORO WAGON CO. v. BLISS et al.

(Supreme Court of Alabama, 1901. 132 Ala. 253, 31 South. 81, 90 Am. St. Rep. 907.)

Appeal from circuit court, Lauderdale county; E. B. Almon, Judge.

Action by the Owensboro Wagon Company against R. L. Bliss and others. From a judgment in favor of the defendants, the plaintiff appeals.

HARALSON, J.[17] * * * The facts in this case, without conflict, show that the defendants and a number of other persons, pursuing closely the provisions of the statute for the purpose (Code, p. 425, art. 11), associated themselves together for the purpose of incorporating the Farmers' Implement Company. They filed their declaration in the office of the probate judge of Lauderdale county, in accordance with the provisions of section 1252 of the Code. This declaration was indorsed: "Farmers' Implement Co. Declaration." "I hereby certify that the within conveyance, was filed in the office for record, on the 5th day of February 1898, and duly recorded in Vol. — of ——— on page —. ———, Judge of Probate." The word "conveyance," in this certificate, was a mere self-corrective clerical error, used for the word, "declaration"; and the fact that the name of the judge of probate is not signed thereto, amounts to nothing. In the absence of statute prescribing what constitutes the filing of a paper, it is said to be filed whenever it is delivered to and is received by the proper officer. A bill in chancery, for instance, is to be considered as filed, when it is put in the custody and power of the court, by depositing it with the register, or with his assistant in his office, with the intention of filing it, although the fact and date of filing are not then indorsed on it. Ex parte Stow, 51 Ala. 69; Truss v. Harvey, 120 Ala. 636, 24 South. 927; 8 Am. & Eng. Enc. Pl. & Prac. 928.

[17] A part of the opinion is omitted.

On the same day the declaration was filed, the judge of probate issued to two of the proposed incorporators, a commission to open books of subscription to the capital stock of the corporation, as per section 1253 of the Code. Afterwards, the commissioners, acting under this commission, opened books of subscription, and more than 50 per cent. of the capital stock was duly subscribed by parties deemed solvent, a list of whom was returned to the court, as a part of the report of the commissioners, and payments in money were made by each of the subscribers of at least 20 per cent. of the stock subscribed by them, respectively. The subscribers met and organized the corporation by the election of a board of directors, a president, a secretary and general manager, and a treasurer, all of which was duly certified and returned in writing to the judge of probate, as provided by section 1255 of the Code. The only missing links for the perfection of a corporation de jure under the statute, as appears, were, that these papers, so returned and filed with the probate judge, were never recorded in his office, and no certificate of incorporation was issued by said judge, declaring said corporation fully organized, as provided by said section 1255 of the Code.

It is too plain for controversy, that a corporation de facto was thus created, there being no allegation or evidence of fraud on the part of defendants and associates in the premises. The evidence shows, and the fact is undisputed, that under such incorporation, the company entered upon the transaction of business; that it was understood in the community to be a corporation, and, as such, it instituted and maintained suits in the justice's court of Florence. It was shown, that these defendants took no part in the management of the corporation; that they each paid in full, the stock subscribed by them, and never knew that a de jure corporation was not in fact organized, but supposed and believed it had been done. The defendant, Young, was president of the company, and testified that one J. M. Lassiter, the secretary and general manager, transacted all the business, and he, the witness, had nothing to do with its management, and never examined the books of the concern. The defendant, Bliss, testified to the same thing, as for himself. There was no evidence tending to show, that defendants had anything to do with contracting the account on which they are sued, or knew anything about it; nor that they ever consented to become partners in said corporation, or agreed to be anything more than stockholders therein, or ever held themselves out, or agreed that any one else should hold them out as partners therein, or were guilty of any fraud in the organization of said company. So far as the evidence shows or tends to show, their conduct was characterized by good faith towards their associates and the persons transacting business with the company.

The evidence of plaintiff tended to show, that it had no actual notice of the incorporation of said company as a de facto organization,

even. Its secretary and treasurer, W. A. Steele, testified by deposition, that no member of the Farmers' Implement Company, ever informed the plaintiff that said implement company was a corporation; that plaintiff never heard that it was such an organization, and that he thought that J. M. Lassiter, deceased, who was the secretary and managing agent of said implement company, informed the plaintiff by letter that defendants were members of a copartnership by that name, though he could not find or produce said letter. The evidence does not show, however,—even if that statement were taken as evidence of the fact, a question we need not decide,—that either of defendants ever authorized Lassiter to make such an admission as to them, or that they ever knew he made any such statement, without which, they were not bound by his declarations. The declarations of one partner, not made in the presence of his copartner, are never competent to prove the existence of the partnership between them. It is only when the partnership has been otherwise proved, that the declarations of one partner are evidence against the other, as to the conduct of the partnership business. The existence of a partnership can never be established by general reputation or on hearsay evidence. Bank v. Leland, 122 Ala. 289, 25 South. 195.

In the absence of an agreement to become partners in the company, defendants cannot be held liable as such, unless they hold themselves out as partners. Holding one's self out, or permitting himself to be held out as a partner in a firm, will make him liable as such, to third persons who have been misled by, or who have acted upon such holding out; and in such case, the one so held out would be estopped as to them to deny that he was a partner. 17 Am. & Eng. Enc. Law, 879; George, Partn. p. 80; Marble v. Lypes, 82 Ala. 322, 2 South. 701; Fertilizer Co. v. Reynolds, 85 Ala. 19, 4 South. 639. As we have said, there is an entire absence of evidence tending to show that defendants ever knowingly or intentionally entered into a partnership relation with their associates, or ever held themselves out as copartners with them, or permitted any other person to do so.

The evidence shows, furthermore, beyond conflict, that at the time the plaintiff's contract with the Farmers' Implement Co. was entered into,—on the 2d July, 1898,—the papers above referred to, for the incorporation of said company, were on file in the office of the probate judge, having been filed therein, on the 5th of February, preceding, and remained there on file, until the 28th of October following, when the judge of probate allowed J. M. Lassiter to take them away,—for what purpose, is not shown. The judge took the receipt of Lassiter for the papers, which receipt the judge himself wrote or dictated, reciting what papers they were, and that they were "all the papers that were ever filed in the office of the said probate judge, of said corporation."

The plaintiff, at the time it contracted with said association, had thus, constructive notice of what was done towards the incorporation of the company, and that it had, at least, a de facto existence, which status was unaffected by the action of said Lassiter, in taking said papers from the probate office.

The fact that the Farmers' Implement Company had not, at the time it purchased the goods from plaintiff, paid the state and county license to do business, could not affect the status of the de facto corporation differently from what it would have affected a de jure corporation. The only possible effect such failure could have, would have been to render the company liable to the penalty prescribed by statute in such cases.

It is contended, again, that the failure to pay the fee prescribed by section 1287 of the Code, rendered the effort at incorporation abortive, and that the company, in consequence, did not have a de facto existence, even. In Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340, 25 South. 566, we held, that if a commission is issued to a corporation organized under the statutes, the fact that the required fee was not paid, would not, of itself, prevent the corporation from having a de facto existence; but its contracts as stated, would be void. The statute under which that decision was made (Acts 1894–95, p. 1024), provided that all contracts by any corporation which had not first complied with the requirement for the payment of this fee, should be wholly void. That provision was not carried into the Code of 1896, but was omitted therefrom. Section 1287. Without reference to that fact, however, the failure to pay the fee, would not, as stated, of itself have prevented the formation of a de facto corporation. If they never intended, and did not agree to become partners, but desired in good faith to organize under the statute a corporation, which they failed to fully perfect, but did organize one de facto, under color of law, which came into the exercise of corporate functions, the stockholders of such an organization, cannot be made liable as partners. Authorities supra.

Under the pleadings, and the legal evidence as developed on the trial, the court, in trying the case without a jury, very properly, as we think, found in favor of the defendants, and rendered judgment accordingly. Affirmed.

BIGELOW v. GREGORY et al.

(Supreme Court of Illinois, 1874. 73 Ill. 197.)

This was an action of assumpsit, brought by Bigelow, appellant, against Charles A. Gregory, Franklin H. Watriss, Oramel S. Hough, and Reuben Hatch, as co-partners, doing business under the name and style of the Warfield Cold Water Soap Company, to recover

for goods sold and delivered. The defendants in the court below pleaded the general issue, and also interposed a further plea denying the partnership, verifying the same by affidavit. The cause was tried by the Court without a jury, and the issues found and judgment rendered for the defendants. The plaintiff brings the record here by appeal to reverse the judgment.

From the testimony, it appears that, in November, 1870, the defendants, with one Isaac N. Gregory, signed a certain paper, commencing:

"Articles of association of Warfield's Cold Water Soap Company of Milwaukee.

"We, the undersigned, being desirous of forming a company for the purpose of carrying on a manufacturing business, as hereinafter stated, under authority of the act of the Legislature of the State of Wisconsin, relating to joint stock companies, approved April 2, 1858, and acts amendatory thereof, do hereby agree and certify that the name of the company is and shall be, Warfield's Cold Water Soap Company, of Milwaukee," proceeding to state at length the objects of the company, the amount of its capital stock, its number of shares, the term of existence of the company, the number and names of the directors for the first year, they being the subscribers themselves, how the capital stock should be paid, the signers subscribing for all the stock, and agreeing to pay it as required by the directors, and concluding:

"We hereby adopt the foregoing as the articles of association of said Warfield's Cold Water Soap Company, of Milwaukee, for the purpose of becoming a body politic and corporate under said name.

"Witness our hands, at Chicago, Illinois, this twenty-third day of November, A. D. 1870.

Charles A. Gregory,
"Franklin H. Watriss,
"Oramel S. Hough,
"Reuben Hatch,
"Isaac N. Gregory."

This paper was filed in the office of the Secretary of State of Wisconsin, on the 8th day of July, 1871, and in the office of the city clerk of Milwaukee, August 23, 1871. It was also published in two newspapers in Milwaukee, the "Guide" and the "Herald," September 13th and 15th, 1871.

The Revised Statutes of Wisconsin were introduced in evidence, and the act under which defendants claimed to have become incorporated. * * *

Business was done under the name of the company, in which the defendants were jointly interested. There is no controversy as to the sale and delivery of the goods.[18]

SHELDON, J. The only question here arising is, whether the de-

[18] Statement of facts abridged.

fendants were exempt from individual liability by reason of having become a corporation.

The second section of the act of Wisconsin, under which defendants claim to have become incorporated, provides that, the persons who, by articles of agreement in writing, should associate according to the provisions of that law, and who should comply with the provisions of that chapter, should become a body politic and corporate, etc. Not that they should so become by articles of agreement in writing, but the further thing was required, of a compliance with the provisions of that chapter.

Section 17 is express that, before any corporation formed and established by virtue of the provisions of law shall commence business, the articles of association should be published in two newspapers in the county in which the corporation was located, and the certificate required should be deposited with the Secretary of State, and a duplicate with the clerk of the town or city where the corporation was to transact its business.

We are of opinion that in this case, as the question here comes up, the right of the defendants to be considered a corporation depends upon their having complied with the requirements of the statute, at least to the extent of the publication of their articles of association, and the filing of the certificate. These are important acts as affects the public interest, as affording means of notice respecting the corporation to such as deal with it, so that they may regulate their action and give or withhold credit accordingly, and we think they are to be regarded as statutory prerequisites, essential to corporate existence.

The defendants are seeking escape from individual liability; let them show that they have complied with the statute which enables them to do so, at least substantially, as respects the above named acts. Such we regard to be the doctrine of the authorities. Unity Insurance Co. v. Cram, 43 N. H. 641; Mokelumne Mining Co. v. Woodbury, 14 Cal. 425, 73 Am. Dec. 658; Harris v. McGregor, 29 Cal. 124; Spencer Field v. Paul Cooks, 16 La. Ann. 153; Angell & Ames on Corp. § 83.

Various cases decided by this court have been cited by appellees' counsel, containing general expressions to the effect that an organization in fact and user under it are sufficient to show a corporation de facto, although there might have been irregularities or omissions, and that these could not be urged collaterally against the existence of the corporation, but only in a direct proceeding by scire facias, or by information in the nature of a quo warranto. But these cases, we conceive, have but an imperfect application here. Some of them were cases where special charters had been granted, and almost all were cases between the company and its stockholders. There is a manifest difference where a corporation is created by a special char-

ter and there have been acts of user, and where individuals seek to form themselves into a corporation under the provisions of a general law. In the latter case, it is only in pursuance of the provisions of the statute for such purpose, that corporate existence can be acquired. And there would seem to be a distinction between the case where, in a suit between a corporation and a stockholder or other individual, the plea of nul tiel corporation is set up to defeat a liability which the one may have contracted with the other, and the case of a suit against individuals who claim exemption from individual liability, on the ground of their having become a corporation formed under the provisions of a general statute. In the latter case, a stricter measure of compliance with statutory requirements will be required, than in the former.

The most pertinent of these cases referred to in this court are Cross v. Pinckneyville Mill Co., 17 Ill. 54, and subsequent cases following it, where it was held that, under the Act of 1849, p. 87, the filing of the duplicate certificate of organization in the office of the Secretary of State, required by the first section of that act, was but directory, and the omission to so file it did not defeat the organization. But it was put upon the ground that, as the first section required the certificate to be filed in the office of the clerk of the county in which the business of the company was to be carried on, the filing of the duplicate in the office of the Secretary of State was regarded as a secondary object; and that that view was confirmed by the language of the second section, in declaring that "when the certificates shall have been filed as aforesaid," the persons signing, and their successors, "shall be a body politic and corporate in fact and in name." And it was there said: Whatever is expressly or impliedly required to be done, as essential to bring the corporation into existence, must be done.

This court has never held that individuals could make themselves a corporation by the mere signing of articles of agreement. And in the language of Parsons on Partnership, p. 544, "we do not believe that a joint-stock company, or any other partnership, can limit its own liabilities and become a corporation or limited partnership by its own act and without any regard to the formalities or requirements of the law;" and see Stowe v. Flagg et al., 72 Ill. 397.

The account sued on commenced March 2, 1871, and ended August 19, 1871.

Nothing had been done toward incorporation, except the signing of the articles of association, until July 8, 1871, when the articles were filed with the Secretary of State of Wisconsin. They may be regarded, perhaps, as substantially embracing the particulars required in the certificate. The greater portion of the indebtedness sued for had been contracted prior to that time.

The filing of the articles in the office of the city clerk of Mil-

waukee, in which place the business of the corporation was to be transacted, and the publication in the newspapers, did not take place until after August 19, 1871, when the whole indebtedness had been contracted.

We are of opinion the defendants were liable as partners, and had not absolved themselves from responsibility as such by having become a corporation.

The judgment will be reversed. Judgment reversed.

WELLAND CANAL CO. v. HATHAWAY.

(Supreme Court of New York, 1832. 8 Wend. 480, 24 Am. Dec. 51.)

The declaration contained the common money counts, and the plea was the general issue. A special verdict was found by the jury, from which it appears that the defendant was a contractor to execute and construct a portion of the Welland Canal in Upper Canada, and that by mistake, for the work done by him, he was overpaid the sum of $1,000, to recover back which sum this suit was brought. In support of the action, the plaintiffs gave in evidence a receipt, signed by the defendant, in these words: "Received from Wm. Hamilton Merritt, agent W. C. C. the sum of £250 currency. April 7, 1827."

The jurors found that the letters W. C. C. stood for and were understood to mean the Welland Canal Company, and that William Hamilton Merritt was the agent of the company; and they found various other facts relative to the work done by the defendant and his contract in relation to the same, but whether or not, upon the whole matters, the plaintiffs are a body corporate, by the name of the Welland Canal Company, the jurors are ignorant and pray the advice of the court—which is the sole question presented by the special verdict.

NELSON, J.[19] That the plaintiffs must, at the trial, prove themselves duly incorporated by competent authority, on the plea of the general issue, is not to be contested at this day in this court. Bank of Auburn v. Weed, 19 Johns. 300; Utica Ins. Co. v. Tilman, 1 Wend. 555. This is conceded by the counsel for the plaintiffs, but it is contended that the receipt of the defendant and his contract with the agent of the company ought to estop him from denying their legal existence; or at least are prima facie evidence of that fact, subject to be rebutted. There is a dictum of Ch. J. Thompson, in Dutchess Cotton Manufactory v. Davis, 14 Johns. 245, 7 Am. Dec. 459, which is relied on by the plaintiffs. In that case there was a demurrer to some of the counts in the declaration, and one of the causes assigned was the want of an averment that the plaintiffs

[19] A part of the opinion is omitted.

were a body corporate, duly organized in pursuance of the law, which the learned judge was considering when the opinion was pronounced. The remark, therefore, "The defendant having undertaken to enter into a contract with the plaintiffs in their corporate name, he thereby admits them to be duly constituted a body politic and corporate under such name," was not necessary to the point under consideration.

The case of Henriques v. Dutch West India Company, 2 Ld. Raym. 1535, was there cited, and is relied upon in this case as an authority for the plaintiffs. Upon examination, I think it will be found rather favoring the defendant's position. The Dutch West India Company sued Henriques in the C. B. in England, for money borrowed of them in Holland, and recovered. See the case before the C. B. on questions reserved at the trial by Ld. Ch. J. King, 1 Str. 608. From this report it appears that the cause went to the K. B. and House of Lords, and was affirmed. From the case in Ld. Raymond it appears that a scire facias was brought in the C. B. against the bail of Henriques in the above suit upon their recognizance. The bail pleaded there was no record of such recognizance as set forth in the scire facias, to which the company replied there was; and upon this issue the court rendered judgment for the plaintiffs. This judgment was carried to the K. B. and two objections taken to its correctness by the plaintiffs in error, neither of which touch the question under consideration. The judgment was affirmed in the K. B. except as to damages for the delay of execution, 5th of July, 1728. On the 25th April, 1730, the cause having been brought into the House of Lords, was there heard, and the counsel for the planitiffs in error for the first time raised the question that no recognizance could be given to this company in England, as the law does not take notice of a foreign corporation, nor can a foreign corporation, in their corporate name and capacity, maintain an action at common law, and, therefore, the recognizance was void. To this the counsel for the company answered that the plaintiffs were estopped, by their recognizance, to say there was no such company; and the judgment was affirmed.

The correctness of this decision may be safely admitted without affecting in any way the question now before the court. It was clearly not competent for the bail to draw into litigation the right of the company to sue them in their corporate name, in that particular case, after a recovery against their principal in the suit in which they had entered into the recognizance in question, and this, no doubt, was what the counsel meant in their answer to the objection before the House of Lords. In a note to this case, the reporter states that Ld. Ch. J. King, who tried the cause of the Company v. Henriques, told him he made the plaintiffs give in evidence the proper instruments by which, according to the laws of Holland, they were created a corporation. The report of the case (1 Str. 608) also shows this

fact. The circumstances under which this company were constituted a body corporate, and their privileges, are there briefly stated. The species of the evidence by which the facts were shown does not appear, but that is supplied by the note above. The whole case, therefore, I think, must be considered an authority against the principle contended for by the plaintiffs in this suit.

An estoppel is so called, because a man is concluded from saying any thing, even the truth, against his own act or admission. The acts set up in this case, it is not pretended, constitute a technical estoppel, which can only be by deed or matter of record, but it is said they should operate by way of estoppel—an estoppel in pais. Such estoppels cannot be pleaded, but are given in evidence to the court and jury, and may operate as effectually as a technical estoppel, under the direction of the court. Co. Lit. 352; Vin. Abr. tit. Estoppel, 422; 19 Johns. 490; 1 Gilb. Ev. 87. From the manner in which a party must avail himself of them, it is obvious that there can be no fixed and settled rules of universal application, to regulate them, as in technical estoppels. There are many acts which have been adjudged to be estoppels in pais, such as livery, entry, acceptance of rent, etc.; but in many and probably in most instances, whether the act or admission shall operate by way of estoppel or not, must depend upon the circumstances of the case.

As a general rule, a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. The case of First Presbyterian Congregation of Salem v. Williams, strikingly illustrates this general proposition. There the plaintiffs, by their attorney, called upon the defendant for his rent, and inquired if there was any property upon the premises out of which it could be collected by distress; he answered there was not, and pointed out all the property he had, which was but a trifle. On the trial of the ejectment, brought for the default in payment of the rent, the defendant offered to show there was sufficient property on the premises out of which the rent could have been collected. The court decided that he was estopped from disputing the truth of his admission to the plaintiff's attorney. All the cases I have seen in which the acts or admissions of the party are adjudged to operate against him, in the nature of estoppel, are generally cases where, in good conscience and honest dealing, he ought not to be permitted to gainsay them.

From this brief view of the nature and reasons of the law of estoppel, as sought to be applied by the plaintiffs, I am satisfied the case under consideration does not fall within them. The plaintiffs held themselves out to the world as a corporate body, duly constituted to transact business in the manner and under the circumstances detailed in the special verdict, and the defendant has contracted with

and done labor for them under the supposition that these professions were correct. If they have not the powers and privileges assumed on their part in their dealings with him, it is their own fault, not his. Whether they had these powers must have been known to themselves, not to the defendant, and no act of his could legally add to or detract from them. Why, then, should he be estopped from denying their corporate capacity, or they be excused from establishing it by legal evidence, when they are endeavoring to enforce their rights in a manner, and before a tribunal, which can entertain their suit only upon the proof or assumption that they are a corporate body, duly constituted by competent authority? Again, every estoppel ought to be reciprocal, and binding on both parties. Viner's Abr. tit. Estoppel, 463 (26), 422. This is universally true in all technical estoppels, and I apprehend it must be so in all cases to which the doctrine is applied, where the nature of the transaction will admit of it. Would, then, plaintiffs, in a suit by the defendant on a contract, be estopped from denying their corporate capacity to enter into such contract? I apprehend they would not, and that in effect it has been thus frequently adjudged. Head & Armory v. Providence Insurance Company, 1 Condensed R. 371, and cases there referred to; Beatty v. Marine Ins. Co., 2 Johns. 109, 3 Am. Dec. 401; New York Fire Ins. Co. v. Sturges, 2 Cow. 664; Goszler v. Corporation of Georgetown, 6 Wheaton, 593, 5 L. Ed. 339; Bank of Columbia v. Patterson, 7 Cranch, 299, 3 L. Ed. 351; 2 T. R. 169; 5 Common Law R. 216. All these cases either expressly or impliedly determine that a corporation can bind itself only in pursuance of the powers given by the act of incorporation, and not otherwise.

But it is said that the defendant, by his contracts with the company, has admitted that they are a body corporate, duly constituted by law. I cannot assent to this position. The evidence proves that he has contracted with the agent of an association denominating themselves the Welland Canal Company, and nothing more. Whether they were incorporated by competent authority, or if incorporated, what were their legal capacities, are not admitted by him. To justify the inference attempted to be drawn from the contract with the plaintiffs, it must first be shown that there cannot exist an association styling themselves the Welland Canal Company, unless such association be incorporated and possess a legal capacity to contract, and to prosecute suits in courts of justice: but if such association can exist without being incorporated, why infer more than appears upon the fact of the contract? Suppose the defendant had brought an action against the agent of this company on a contract made with him, could the agent set up as a defence that by the terms of the contract the defendant had admitted that he not only acted as agent, but that he was duly constituted such agent? Certainly not. It is well settled that he must plead and prove his authority so as to give

a remedy against the company. Randall v. Van Vechten, 19 Johns. 60, 10 Am. Dec. 193; White v. Skinner, 13 Johns. 307, 7 Am. Dec. 381; Mott v. Hicks, 1 Cow. 536, 13 Am. Dec. 550. And this must generally involve proof of the legal existence of the corporation. The contract on its face would show that he acted as agent, but he must prove that he was duly constituted such agent, and show the nature and extent of his powers.

So in this case, the receipt and contract show the fact of an association, acting under a particular name. So much appears on the face of the contract, and may be said to be admitted, but that is not enough for the plaintiffs; it must also appear that they had legal authority and capacity thus to act, and to prosecute suits by such name, before their suit can be entertained. In Jackson v. Plumbe, 8 Johns. 378, the court say, the rule seems to be that when a corporation sues, either on a contract or to recover real property, they must at the trial under the general issue prove that they are a corporation. In the case of Bill v. Fourth Great Western Turnpike Company, 14 Johns. 416, the suit was brought on a contract made by the plaintiffs in error with the defendant. The court reversed the judgment because there was no legal proof that the plaintiffs below were a corporation. In the case of the National Bank of St. Charles v. De Bernales, 11 Common Law R. 475, letters of the defendant were proved on the trial before Ch. J. Abbott, confessing an indebtedness to the bank of £19,000, yet the copy of the charter of the king of Spain was produced, incorporating the bank. This it seems was deemed necessary by the counsel and court. It is true the question here presented was not raised in either of the above cases, though it might have been in the two last, and I cite them only to show the understanding of the profession, and the practice of the courts. Without pursuing the examination of this question further, the conclusion to which I have arrived is, that the defendant has neither admitted the legal existence of the plaintiffs as a corporate body, nor has he done anything by which he is estopped from denying it.
* * *

On the ground, then, of the error of the judge, and that the special verdict is wholly unauthorized and void, so much so that no final judgment can be rendered upon it, we grant a new trial, with costs to abide the event.[20]

[20] Accord: Williams v. Hewitt, 47 La. Ann. 1076, 17 South. 496, 49 Am. St. Rep. 394 (1895); Provident Bank & Trust Co. v. Saxon et al., 116 La. 408, 40 South. 778 (1906). But see Estey Manufacturing Co. v. Runnels, 55 Mich. 130, 20 N. W. 823 (1884); West Winsted Savings Bank & Building Association v. Ford, 27 Conn. 282, 71 Am. Dec. 66 (1858); Newcomb-Endicott Co. v. Fee, 167 Mich. 574, 133 N. W. 540 (1911).

In Guckert v. Hacke et al., 159 Pa. 303, 28 Atl. 249 (1893), where the plaintiff was seeking to hold the associates as partners, the court through Chief Justice Sterritt says: "It may be conceded that had plaintiff dealt with defendants as a corporation he would have been estopped from claiming against

RYAN v. MARTIN et al.

(Supreme Court of North Carolina, 1884. 91 N. C. 464.)

Ejectment, tried at July special term, 1884, of Guilford Superior Court, before Graves, J.

The plaintiff bought the land in dispute at a sheriff's sale under a judgment and execution (obtained in a suit begun by attachment under the law as it existed prior to the C. C. P.) against the Deep River Mining Company; and with a view to conclude the defendant from denying the title of said company, and to obviate the necessity of showing title out of the state the plaintiff put in evidence the transcript of the record of a suit in Rowan Superior Court, of B. T. Martin (defendant in this case) against the said company, which showed a judgment in favor of Martin, and the same was docketed in Guilford County and executions issued thereon, and returned. * * *

The plaintiff, on objection, was allowed to prove by what names the said company was called, to-wit, sometimes the "Deep River Mining Company," and sometimes the "Deep River Copper Mining Company." Defendant excepted upon the ground that parol evidence was not admissible for such a purpose, and also that the existence of such company, under which plaintiff claims, had not been shown by a charter or an organization; and that its existence not being thus proved, it had no capacity to hold and have title to land, and therefore the sheriff's sale and deed to plaintiff conveyed no title, and the deed was void; and further, that the doctrine of estoppel does not apply in this case, and the plaintiff must show title out of the state to enable him to recover.

His honor being of opinion against the defendant, instructed the jury accordingly. Verdict and judgment for plaintiff, and appeal by defendant.[21]

MERRIMON, J.[22] The defendant contended, that it did not appear by any proper evidence that the Deep River Mining Company had

them in any other capacity, even though they failed to record their charter. Spahr v. Bank, 94 Pa. 429 (1880). But it is not pretended that he had any knowledge of the existence of the charter; and there was certainly nothing, either in the name under which they did business or in their conduct, which should have put him upon inquiry. In these circumstances he was amply justified in dealing with them as partners. It was through their default—not his—that they were so treated; and it would be manifest injustice that he should lose his admittedly honest claim. In the absence of an express agreement the acceptance of a note from the defendants, as a corporation, after the plaintiff had performed his part of the contract, cannot operate by way of election or estoppel. The relation of the parties was fixed by their status when the original contract was made and cannot be changed by gratuitous inference. The members of the alleged corporation were the defendants and were not injured by the acceptance of said note."

[21] Statement of facts abridged. [22] A part of the opinion is omitted.

any corporate organization or capacity to hold and have title to land, or other property, and therefore, the deeds put in evidence on the trial were void.

It is true, that it must appear that there was a corporate existence either de jure, or de facto, at least. And if the corporation itself were suing, it would be necessary for it to prove its charter and an organization in accordance therewith, if these were properly put in issue. But if a person entered into a contract with a body purporting to be a corporation, or claims to hold property purchased and derives title thereto from it, this is prima facie evidence against such person that such corporation was in existence de facto at least, at the time of the contract with or purchase from it, and the presumption arises in such case, that the existence of the corporation continues at the bringing of the action.

Accordingly, it has been held in an action against the maker of a promissory note executed to a corporation as payee, in its corporate name, the production of the note duly endorsed to the plaintiff was sufficient evidence that the corporation was duly organized and competent to transact business. Williams v. Cheney, 3 Gray (Mass.) 215, 220. It was said in that case, that "the defendants, by giving their notes to the corporation in their corporate name as payees, admitted their legal existence and capacity to make and enforce the contracts declared on, so far at least, as to render proof on that point unnecessary in the opening of the plaintiff's case."

And in Jones v. Cincinnati Type Foundry Co., 14 Ind. 90, it was so held. In that case, the action was brought by a corporation upon a note executed to it in its corporate name; the defendant, in his answer, insisted that the plaintiff had no legal capacity to sue, because it was not a corporation. The court held, however, that the production of the note was sufficient evidence to warrant a judgment for the plaintiff, no other evidence having been offered. In that case, it was said, "As a general proposition, it is the law of this state, (Indiana,) that a contract with a party as a corporation, estops the party so contracting to deny the existence of the corporation at the time it was contracted with as such. * * * In New York, to work such estoppel, it has been necessary that the contract should state that the party contracted with was a corporation. But this rule does not prevail in other states. It has not been acted upon in this state. If the style by which a party is contracted with is such as is usual in creating corporations, viz.: naming an ideality, but disclosing that of no individual, as is usual in the cases of simple partnerships, it has been treated as prima facie, at least, indicating a corporate existence. * * * But in this class of cases it would seem, after all, that the courts have proceeded upon a rule of evidence rather than the strict doctrine of estoppel. They have treated the contract with a party by name implying a corporation, really as evi-

dence of existence of a corporation, more than an estoppel to disprove such fact."

This seems to us a just and reasonable exposition of the rule of law applicable in such cases. It is not to be presumed that a party will contract and deal with a nonentity. It will be presumed to the contrary as to him, that he did not. Stanly v. Railroad, 89 N. C. 331; Mor. on Pr. Corp. §§ 136, 138.

The objection that the corporation in question was sometimes called the "Deep River Mining Company," and likewise, "Deep River Copper Mining Co.," and other like names, is not well founded. A corporate name is essential, but the inadvertent or mistaken use of the name, is ordinarily not material, if the parties really intended the corporation by its proper name. If the name is expressed in the written instrument, so that the real name can be ascertained from it, this is sufficient; but if necessary other evidence may be produced to establish what corporation was intended. And the same rule applies to devises and bequests to corporations. A misnomer of a corporation has the same legal effect as a misnomer of an individual. Deaf & Dumb Inst. v. Norwood, 45 N. C. 65; Mor. on Pr. Corp. § 181, and cases there cited.

The defendant likewise insisted that, admitting the Deep River Mining Company was the source of title common to the plaintiff and defendant, and was capable of holding and having title to the land in question, the sheriff's deed to the defendant put in evidence, could not so operate as to estop the latter from denying the title of the company, and thus relieve the plaintiff from the burden of showing title out of the state, because, the evidence offered in respect to such deed was mainly parol, and not the deed itself.

It is a well established rule of law, that when both the plaintiff and the defendant claim the property in controversy under the same person, neither of them can deny the right or title of the person under whom they so claim; and as between themselves, the one having the elder has the better title and must prevail. The conclusion thus established between the parties is not so strictly and technically an estoppel, but it is in the nature of and has the practical force and effect of an estoppel. This rule of law is founded in justice and convenience, and its purpose is to prevent the necessity on the part of the plaintiff in cases like this, of proving title out of the state, and a good title in the person under whom he claims, when the opposing party claims the same property under the same person. If the defendant has the same source of title as the plaintiff, and no other, wherefore need the plaintiff go beyond that as to the defendant?

Such an inquiry would be idle. It is plain that no injustice in such case could be done the defendant; and if the rule were otherwise, it might and would in many cases put the plaintiff to great inconvenience and much needless expense. This court has recognized and up-

held the rule in many cases. Murphy v. Barnett, 6 N C. 251; Ives v. Sawyer, 20 N. C. 179; Love v. Gates, 20 N. C. 498; Gilliam v. Bird, 30 N. C. 280, 49 Am. Dec. 379; Johnson v. Watts, 46 N. C. 228; Thomas v. Kelly, 46 N. C. 375; Feimster v. McRorie, 46 N. C. 547. * * *

No error. Affirmed.

SOCIETY PERUN v. CITY OF CLEVELAND.

SAME v. HAY.

(Supreme Court of Ohio, 1885. 43 Ohio St. 481, 3 N. E. 357.)

On January 28, 1874, the city of Cleveland conveyed to Perun (an incorporated school and literary society) certain real estate situated in that city, and, to secure the unpaid purchase money therefor, Perun, on the same date, executed and delivered to the city its four promissory notes and a mortgage upon the premises conveyed. The city neglected to file this mortgage for record until October 21, 1879. In February, 1874, certain persons attempted to organize a mutual benefit association, under an act supplementary to an act to provide for the creation and regulation of incorporated companies, passed May 1, 1852, (Swan & C. St. 271,) passed April 20, 1872, (69 Ohio Laws 82,) under the corporate name of "Society Perun." Thereafter, in May, 1874, Perun delivered to Society Perun its deed purporting to convey to the latter the premises theretofore mortgaged to the city. From that time forward, and prior to the filing of the city's mortgage for record, Society Perun, acting in its supposed corporate capacity, from time to time executed and delivered deeds, mortgages, and executory contracts of sale, purporting to convey, incumber, and sell parcels of these mortgaged premises to various parties, who were made defendants in the action below, and some of whom (including Amasa Stone, a mortgagee, and who had paid taxes upon the premises mortgaged to him) are cross-petitioners in error.

Thereafter, in June, 1880, in a proceeding in quo warranto in this court, instituted by the attorney general, Society Perun was adjudged not to have become incorporated in conformity to the laws of this state, but that its pretended incorporation was in violation thereof; and it was accordingly ousted of all rights and franchises to be a corporation. These proceedings in quo warranto were had pending, and prior to the final judgment in, the action below; which was brought by the city to foreclose her mortgage, and also to foreclose her supposed vendor's lien on the mortgaged premises, as against these subsequent grantees, mortgagees, and purchasers. The cause was appealed from the court of common pleas to the district court,

wherein it was tried upon the issues; the court finding, among other things, that, as to the city of Cleveland, Society Perun was not a corporation either in law or in fact, and that the conveyance to it by Perun was void as against the city; and that the mortgages and other liens and claims of all the defendants (except the lien of Amasa Stone for taxes, and the claims of certain defendants for improvements on the premises) were subsequent and inferior to the lien of the city, in whose favor the court adjudged the second lien, and subsequent only to the lien of Amasa Stone for taxes paid by him, but of equal rank and merit with the holders of liens for expenditures on account of improvements above mentioned.

By the judgment in the quo warranto proceeding it was by this court in form adjudged that the defendants, (the pretended incorporators,) ever since their pretended incorporation, had unlawfully and without authority exercised the franchise of, and usurped the right to be, a body corporate; that the pretended organization of these defendants as a corporation was wholly void and of no effect, and vested in them no corporate rights, powers, privileges, or franchises of any description whatever. * * * The sole ground upon which this judgment of ouster was rendered, was that while the statute required that they should set forth in their certificate of incorporation (among other things) the manner of carrying on the business of the association, the attempted compliance with this requirement was in these words: "Third. That the manner of carrying on the business of said association shall be such as may be from time to time prescribed by the by-laws of such association: provided, that the same shall not be inconsistent with the laws of the state of Ohio."

Upon the trial below the plaintiff gave in evidence, against the objection of defendants, the record of the quo warranto proceedings. The defendants offered in evidence the writing which was filed with the secretary of state as the certificate of incorporation of Society Perun. They also offered to prove that the pretended incorporators proceeded to comply strictly with requirements of the statutes; that they elected trustees, prepared a certificate of incorporation stating explicitly the manner of carrying on the business; that this was forwarded to the secretary of state, who submitted it to the attorney general for examination and approval; that the secretary of state returned this paper with another form of certificate, which had been approved by the attorney general and secretary of state, and which was the identical certificate actually filed with the secretary of state, and under the supposed authority of which an organization was in good faith attempted, and that they proceeded in good faith to act and transact its business under the supposed authority of such incorporation. All this was excluded, and the defendants excepted. To reverse this judgment the present proceeding is prosecuted.

The alleged errors chiefly relied upon are the exclusion of the evidence offered to prove an attempt, in good faith, to incorporate Society Perun; the finding and holding of the court that Society Perun had never been, in law or fact, a corporation; that as against the city the deed from Perun was void; and adjudging the city's lien to be prior to the rights and liens of Society Perun and its mortgagees, grantees, and purchasers.[23]

OWEN, J.[24] The defendants below, conceding that Society Perun had never been a corporation de jure, maintain that the court below should have permitted them to prove that such society was a de facto corporation; that it attempted in good faith to become a body corporate; proceeded to act and transact business in good faith under the supposed authority of incorporation; and that its acts ought not to have been declared to be wholly void as against the city of Cleveland. The judgment of ouster was an adjudication between the state and the society upon the right of the latter to exercise corporate franchises. For the purposes of such adjudication, it was competent for this court to consider and determine what had been its status from its first attempt to incorporate. But it had no power to pass upon or determine the rights of parties not before it. It was not competent for this court to determine in that proceeding that Society Perun had never been a corporation de facto, or that its acts and business transactions, under the color of its supposed charter powers, were void. The authority of the court in that behalf was derived from section 6774, Rev. St., which provides: "When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs."

When the court had excluded the society from its franchises to be a corporation, it exhausted its jurisdiction over the subject-matter. It had no power to speak concerning whatever rights may have been acquired by the society as a corporation de facto, or by third parties in their transactions with it as an acting corporation. It is conceded by the city that parties who had recognized the existence of the society by their transactions with it as a supposed corporation are estopped to deny its corporate existence. But it is maintained that the city having engaged in no transactions with it, is free to challenge its existence as a corporation, de facto as well as de jure. The argument is that "no case can be found where it is held that there is a corporation de facto against persons who have in no way recognized its existence as a corporation;" and that "the notion of a de facto corporation is based on the doctrine of estoppel; when estoppel cannot be invoked, there can be no de facto corporation." The theory that a de facto corporation has no real existence, that it is a

[23] Statement of facts abridged. [24] A part of the opinion is omitted

mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority.

A de facto corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation. "It is a self-evident proposition that a contract cannot be made with a corporation unless the corporation be in existence at the time. A real contract with an imaginary corporation is as impossible, in the nature of things, as a real contract with an imaginary person. It is essential, therefore, in order to establish the existence of a contract with a corporation, to show that the corporation was in existence, at least de facto, at the time the contract was made." Mor. Priv. Corp. § 137. It is bound by all such acts as it might rightfully perform as a corporation de jure. Where it has attempted, in good faith, to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly-incorporated body, and valuable rights and interests have been acquired and transferred by it,—no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon, in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation. * * *

Did the court err? This fairly presents the controlling and very important question: Was it competent to show, as against a party who was not estopped to deny its corporate existence, that Society Perun was, at the time of the transactions involved in controversy, a corporation de facto? In Attorney General v. Stevens, 1 N. J. Eq. 369, the relator sought to enjoin the Camden & Amboy Railroad & Transportation Company, and others acting under its authority, from erecting a bridge over a navigable stream. The claim was that the act authorizing the corporation had been perverted and disregarded, and that there was no legal incorporation. The relators were in no manner estopped from attacking the corporate existence of the respondent. The court held: "Where a set of men claiming to be a legally incorporated company, under an act of the legislature, have done everything necessary to constitute them a corporation, colorably, at least, if not legally, and are exercising all the powers and functions of a corporation, they are a corporation de facto, if not de jure; and this court will not interfere, in an incidental way, to declare all their proceedings void and treat them as a body having no rights or powers."

The chancellor, speaking for the court, said: "Here, then, is a set of men, claiming to be a legally incorporated company, under the

act of the legislature, exercising all the powers and functions of a corporation. They are a corporation de facto, if not de jure. Everything necessary to constitute them a corporation has been done, colorably, at least, if not legally; and I do not feel at liberty, in this incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers. It has been seen that the court will not do this where a corporation properly organized has plainly forfeited its privileges; and there is but little difference in principle between the two cases. In both, the corporation is actually in existence, but whether legally and rightfully so is the question. And it appears to me that if the court can take cognizance of the matter in this case, it must in all others where it can be brought up not only directly but incidentally."

This case is approved and followed in National Docks R. Co. v. Central R. Co., 32 N. J. Eq. 755, which held: "Where a corporation exists de facto, the court of chancery cannot, at the instance of private parties, restrain its operations upon the ground that its organization is not de jure. In such case the proper remedy is by quo warranto, or information in the nature thereof, instituted by the attorney general."

The rule of estoppel found no place in this case. In Stockton & L. G. R. Co. v. Stockton & C. R. Co., 45 Cal. 680, it was held that "if a corporation de facto is in the actual possession of a public highway, under a grant of a franchise to improve and collect tolls on the same, a mere trespasser cannot justify his entry thereon on the ground that it was only a corporation de facto, and was not de jure entitled to the franchise." In Williamson v. Kokomo, B. & L. F. Ass'n, 89 Ind. 389, one Leach gave to an acting corporation his mortgage on real estate. Subsequent to the execution and recording of it, he executed another mortgage on the same land to Williamson. In a proceeding to foreclose the junior mortgage, Williamson maintained that the pretended corporation had no legal existence, by reason of defects and omissions in the proceeding to incorporate, and that the senior mortgage was void. He was in no manner estopped by dealings with, or recognition of, the first mortgagee to deny its corporate existence. The court held that "a junior mortgagee cannot defeat a senior mortgage by showing that the corporation to which the senior mortgage was executed was defectively organized, if it be a corporation de facto." Elliott, J., said: "Where persons assume to incorporate under the laws of the state, and in part comply with their requirements, assume corporate functions, and transact business as a corporation, private persons cannot collaterally question the right of such an association to a corporate existence, although there has not been a full compliance with the provisions of the statute. Baker v. Neff, 73 Ind. 68. This rule is not

limited to cases where one by contract admits corporate existence, but is a rule of general application."

It is not easy to distinguish the principle of this case from that of the case at bar. In Pape v. Capitol Bank, 20 Kan. 440, Pape and wife gave their notes to "James M. Spencer or bearer," and their mortgage on real estate to secure them. Spencer transferred the notes to the Capitol Bank of Topeka, an acting corporation, with this indorsement: "Pay the bearer, without recourse on me. James M. Spencer." The mortgage was also transferred to the bank, which proceeded by suit to collect the notes and foreclose the mortgage. Pape and wife interposed the defense that the bank was not, and never had been, a body corporate, by reason (among others) of a defective organization. The bank had assumed corporate functions after an attempt, in good faith, to incorporate, and for a number of years was in the actual and notorious exercise of corporate franchises. Pape had transacted banking business with the plaintiff prior to the purchase of the notes and mortgage, but such business was wholly unconnected with the notes and mortgage in suit. His wife, however, had not in any manner recognized the existence of the bank as a corporate body, and the doctrine of estoppel was not invoked to aid the court in sustaining a judgment of foreclosure against Pape and wife. Brewer, J., says: "The corporation is one de facto; and only the state can inquire, and that in a direct proceeding, whether it be one de jure. * * * There must in such cases be a law under which the incorporation can be had; there must also be an attempt in good faith on the part of the corporators to incorporate under such law; and when, after this, there has been for a series of years an actual, open, and notorious exercise, unchallenged by the state, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defense to the action. No mere matters of technical omission in the incorporation, no acts of forfeiture for misuser after the incorporation, are subject to inquiry in such an action. This is not upon the ground of equitable estoppel, but upon grounds of public policy. If the state, which alone can grant the authority to incorporate, remains silent during the open and notorious assertion and exercise of corporate powers, an individual will not, unless there be some powerful equity on his side, be permitted to raise the inquiry."

In Thompson v. Candor, 60 Ill. 244, Willetts, in February, 1858, deeded to "Mercer Collegiate Institute," a body pretending to be a corporation, the tract of land in controversy. He died in March, 1858. In 1868 his heirs quitclaimed their interest in the land to Thompson, who filed a bill in chancery for the cancellation of the deed from Willetts to the "Institute;" alleging as one of the grounds of relief that the named grantee was not legally incorporated, had

no capacity to take title, and that the deed was void. The court held: "Where parties endeavored to organize a corporation for educational purposes, under the general law, adopt a name, elect trustees, and organize by electing a president and officers, and the trustees had acted for years in managing the property, had leased and mortgaged it, and expended a large sum of money in its improvement, these acts constitute it a corporate body de facto, and the regularity of its organization cannot be questioned collaterally. Such irregularity can only be questioned by quo warranto or scire facias." Thornton, J., says: "In 1856 an attempt was made to organize a corporation under the general incorporation law. A corporate name was selected, trustees were appointed, and an organization effected by the election of a president and proper officers. The trustees thus appointed acted for years in the general management of the property, leased and mortgaged it, and expended a large amount of money. Here, then, was a corporate body de facto which had been engaged in an undertaking involving important interests. The regularity of its organization cannot be questioned collaterally. Any alleged noncompliance with the law can only be inquired into by the writ of quo warranto or scire facias."

There is no suggestion throughout the entire case of the rule of estoppel as an element affecting its disposition. In Persse v. Willett, 1 Robt. (N. Y.) 131, it is held that formal defects in proceedings to organize a corporation are not available to defeat an action brought by a corporation for trespass in wrongfully taking property out of its possession. See, also, as illustrating the principle under discussion: Smith v. Sheeley, 12 Wall. 361, 20 L. Ed. 430; Grand Gulf Bank v. Archer, 8 Smedes & M. (Miss.) 151, 173; Dunning v. Railroad Co., 2 Ind. 438; Dannebroge Min. Co. v. Allment, 26 Cal. 286; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315; Mitchell v. Deeds, 49 Ill. 416; Elizabeth City Academy v. Lindsey, 28 N. C. 476, 45 Am. Dec. 500; Darst v. Gale, 83 Ill. 136; Rondell v. Fay, 32 Cal. 354; Dewitt v. Hastings, 40 N. Y. Super. Ct. 463; Rice v. Railroad Co., 21 Ill. 93; Commissioners v. Bolles, 94 U. S. 104, 24 L. Ed. 46; Banks v. Poitiaux, 24 Va. 136, 15 Am. Dec. 706; Goundie v. Water Co., 7 Pa. 233; Baker v. Backus, 32 Ill. 79; Tarbell v. Page, 24 Ill. 46; Thornburgh v. Railroad Co., 14 Ind. 499; Tar River Nav. Co. v. Neal, 10 N. C. 520; Bear Camp River Co. v. Woodman, 2 Greenl. (Me.) 404.

In Jones v. Dana, 24 Barb. (N. Y.) 395, it was held that if a company has in form a charter authorizing it to act as a body corporate, and is in fact in the exercise of corporate powers at the time of taking a note from an individual, it is, as to him and all third persons, a corporation de facto, and the validity of its corporate existence can only be tested by proceedings in behalf of the people.

In the case at bar, the certificate which was last filed by the society

embraced a full statement of the objects of incorporation and indicated what the nature of its business must necessarily be, and was strongly suggestive of the manner in which it must necessarily be transacted; and while it is not our purpose to call in question the action of this court in the quo warranto proceedings, we have no hesitation in saying that if we were now called upon to determine whether the corporate life of Society Perun should be taken, the question, upon the facts offered in proof, would not be free from doubt and difficulty. It is very clear that the proceedings to incorporate were colorable; and so far as this fact is a test of the existence of a corporation de facto, it is most amply established. That there was proof of user is manifest from the evidence, which was received without objection. That the judgment of ouster did not and could not have a retroactive effect upon the rights of the society, and of the parties who had dealt with it during its de facto existence, is suggested by the opinion of Wright, J., in Gaff v. Flesher, 33 Ohio St. 115. The evidence which was offered and excluded would, if credited, have shown Society Perun capable of holding and transferring the legal title to the lands in controversy. Walsh v. Barton, 24 Ohio St. 43; Darst v. Gale, 83 Ill. 136; Shewalter v. Pirner, 55 Mo. 218; National Bank v. Matthews, 98 U. S. 628, 25 L. Ed. 188; Goundie v. Water Co., 7 Pa. 233; Barrow v. Nashville, etc., Co., 9 Humph. (Tenn.) 304; Kelly v. People's Transp. Co., 3 Or. 189; Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 758.

The public and all persons dealing with the society were justified in assuming that the certificate filed with the secretary of state, and by him admitted to record in his office, had been approved by him and also by the attorney general, as required by statute, (69 Ohio L. 150,) and that it so far conformed to all legal requirements that, as provided in section 2 of the act of incorporation, (69 Ohio Laws, 80,) "a copy duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such association." It would seem that such approval, record, and certificate, followed by uninterrupted and unchallenged user for nearly six years, of all of which proof was tendered, would constitute a corporation de facto, if such a body is, under any circumstances, entitled to legal recognition. The highest considerations of public policy and fair dealing protest against treating such an organization as a nullity and all of its transactions void.

The principle of these cases is to be distinguished from a case where a mere corporation de facto attempts to assert the power of eminent domain by the appropriation of private property to public use. It has been held that the exercise of this right (which is but a delegation of the sovereign power of the state) depends upon the sufficiency and legal validity of the certificate of incorporation and public record of its organization. Railroad Co. v. Sullivant, 5 Ohio

St. 276; Atkinson v. Railroad Co., 15 Ohio St. 21. The case of Raccoon River Nav. Co. v. Eagle, 29 Ohio St. 238, is relied upon by the defendant in error. It was an action to recover upon a stock subscription. A plea of nul tiel corporation was interposed. The plaintiff claimed to be organized under an act to authorize the incorporation of companies "for the purpose of improving any stream of water * * * declared navigable by any law of the state of Ohio." On the trial the plaintiff offered in evidence a certificate by which it appeared that the company was formed for the purpose of improving, etc., Big Raccoon river. Unfortunately, there was no navigable stream in Ohio by that name. No other testimony was offered. There was no proof of user. There was no defect in the form of the proceedings to incorporate, but an attempt to organize and incorporate for a purpose impossible of accomplishment. There was neither a de jure nor de facto corporation. Judgment was properly rendered for defendant.

In excluding proof of what was actually done, looking to the incorporation of Society Perun, and of the subsequent acts of user, which was offered in evidence, there was error, for which the judgment in the first entitled case (as well as that in the Same Plaintiff v. Hay and others, which was tried with it, and involves the same general questions) is reversed. Numerous other questions are presented by the voluminous records in these cases, but as they all depend upon the one central and controlling question discussed above, and as the disposition here made of the cases must lead to a retrial in the light of the principles indicated in this opinion, they are not separately considered. Judgment reversed.

SECTION 3.—SUBSCRIPTION TO STOCK

THRASHER v. PIKE COUNTY R. CO.

(Supreme Court of Illinois, 1861. 25 Ill. 393.)

This was an action of assumpsit, by the Pike County Railroad Company against Charles Thrasher, upon an agreement to subscribe for stock in the plaintiff corporation. * * * A jury was waived and a trial had by the court, who found the issues for the plaintiff, and, refusing a motion for a new trial, rendered judgment against the defendant for $3,000 and costs. The opinion of the court states the other material facts of the case.[25]

[25] Statement of facts abridged.

BREESE, J.[26] The appellee, who was plaintiff in the court below, urges several reasons justifying a recovery in this case, which it is necessary to notice. The declaration contains a special count, averring, that on the nineteenth of March, 1856, the plaintiffs were a body politic and corporate, with power to construct and operate a railroad within the county of Pike, and authorized by law, as such corporation, to secure subscriptions to the capital stock of the company to the amount of one million of dollars, in shares of one hundred dollars each, and, desiring to ascertain what amount of stock would be subscribed, and not having opened regular subscription books, but intending so to do, agreed with the defendant that they would, in a reasonable time thereafter, open books for the purpose of securing such subscriptions, and that they would permit and allow the defendant, when the book should be opened, to subscribe to the capital stock of the company thirty shares of one hundred dollars each, and upon payment therefor, the defendant should be the owner of thirty shares of the capital stock of the company. It is then averred, that the defendant, in consideration of this promise, undertook and promised the plaintiff that he would subscribe to the stock of this company the sum of three thousand dollars, when the books should be opened for subscriptions; that this promise was by a writing, signed by the defendant, and by him delivered to the plaintiff. It is then averred, that on the same day, subscription books to the capital stock of the company were opened, of which the defendant had notice. The breach is, that the defendant neglected and refused to subscribe anything to the capital stock, accompanied by an averment that the subscription, when the books were opened, was due and payable before the commencement of the suit, and although notified thereof, the defendant has refused to pay any part of the sum of three thousand dollars. The common counts are added, in one of which the indebtedness is alleged to be for one hundred shares of the stock of the Pike County Railroad, before that time bargained and sold to the defendant.

This is the cause of action as set forth by the plaintiffs, and it is claimed by them, that they are entitled to recover as damages the par value of the stock, or the amount of calls made from time to time upon it, and which, at the commencement of the suit, amounted to fourteen installments, of five per cent each, making, in all, twenty-one hundred dollars.

This, we do not think, is a fair view of the defendant's liability upon his promise, if one was made to the plaintiffs. His undertaking is, to subscribe a certain amount of stock, when the subscription books should be opened. This promise does not make him a stockholder, and, as such, liable to calls. The company has parted

[26] A part of the opinion is omitted.

with no stock to him, and can only claim as damages, the actual loss sustained by them by his failure, or refusal to subscribe, when he was notified the books were opened for such purpose. The company has the stock which the defendant promised to take, but did not take. His promise is like any other promise, or agreement to purchase any specific article of property. If the property contracted for be retained by the vendor, and there is no delivery to the purchaser, or offer to deliver, the damages must not be measured by the value of the property; for it would not be just, in such cases, that the vendor should retain the property, and recover, also, the value of it from the promisor. Some damage might result from the loss of a bargain, and to such the vendor would be entitled, if the extent could be established. In many cases, they would be merely nominal. On an agreement for the sale and purchase of stocks, and a refusal by the purchaser to take the stocks, the measure of damages, ordinarily, might be the difference between the par value of the stocks and their market value, or between them and money. As well argued by the appellant, the defendant having violated his promise by failing to subscribe, he has acquired no right to stock; nor could a recovery in this action entitle him to become a stockholder. The company retains its stock, and the defendant his money. A stock certificate of three thousand dollars would represent a value to the company equivalent to so much money, and, in a statement of their liabilities, this would appear against the company as so much held by the stockholders, for which the company was responsible. If there is no actual subscription, the company does not incur this liability.

There being no special damages alleged, or proved, we do not think the plaintiffs could recover under this declaration, as they have done, the par value of the stock the defendant promised and agreed to take. A proper count might doubtless be so framed as to justify a full recovery, under sufficient proof. * * * Judgment reversed.

NORTH MISSOURI R. CO. v. MILLER et al.

(Supreme Court of Missouri, 1860. 31 Mo. 19.)

The plaintiff in her petition sets forth that the defendants executed an agreement in writing, dated July 21, 1856, which is set forth below in the opinion of the court, by which they bound themselves to subscribe to the capital stock of the plaintiff certain sums; that the plaintiff located the depot in compliance with the condition of said agreement. The breaches assigned are that the defendants did not subscribe as agreed; that they did not pay to the plaintiff the sums agreed.

At the trial the said agreement was introduced in evidence. The sum set opposite the names of defendants, who signed as partners, was five hundred dollars. It was also shown that a depot was located by the plaintiff on the lands of Diggs near High Hill, and is now used by the plaintiff. The cause was tried by the court without a jury. The court rendered judgment in favor of the plaintiff.

Henderson, for plaintiff in error.

I. The contract was a mere agreement to subscribe. If the contract has been broken, the only remedy is in damages for a failure to subscribe. The location of the depot is not the entire consideration, but upon the location they would subscribe. The fourth instruction asked should therefore have been given. It should appear that the company assented to the contract. The location of the defendant is not evidence of such assent. Barcus v. Hannibal, R. C. & P. Plank Road Co., 26 Mo. 102. The company still holds the stock for sale. There was no evidence that the stock was worth less than par. There are no damages beyond a nominal sum.

EWING, J. The material question in this case is whether the instrument, which is the foundation of the suit, is an actual subscription to the capital stock of the company or a mere agreement to subscribe thereafter. It reads as follows: "We, the subscribers, bind and obligate ourselves to subscribe to the capital stock of the North Missouri Railroad Company the sums set opposite our names, one-half of the amount to be paid in six months, and one-half in twelve months from this date, on condition that a depot is located on the lands of John F. Diggs, which adjoins High Hill. This subscription is made to comply with the terms on which the directors of said company have made the location of a depot on said Diggs' land." The instrument bears date July 21, 1856, and purports to be signed by a number of persons, among whom are the defendants. If the introductory and more formal words of the instrument, taken literally, might contemplate a future subscription, we think it is manifest, from a view of the whole instrument, that an actual subscription was intended, and that such is the legal effect of the undertaking. That clause of the writing which purports to be explanatory of its objects, and which therefore is more truly expressive of its intent than any other, says: "This subscription is made to comply with the terms on which the directors of said company have made the location of a depot," &c.—thus clearly excluding the idea of a mere agreement to subscribe stock at a future period. The clause relating to the payments also sustains this construction. If it were a mere agreement of the kind contended for, why the stipulation to pay the money within a given time from the date of the instrument, one-half the sum in six and the remainder in twelve months? No corresponding limit is imposed on the company as to the fulfillment of the condition on their part; no right of action could accrue to

it until the depot was located; and yet the subscribers have obliged themselves to pay the sums promised within a specified period, without exacting from the company the performance of the condition (which creates the liability to pay) before such payment is to be made. This stipulation is consistent only with the idea of an actual subscription in præsenti. This interpretation of the instrument disposes of the questions arising upon the instructions.

As to the assent of the company to the terms of the instrument, which it is maintained is not shown, it is only necessary to observe that the directors represent the corporation, and the contract purports to have been entered [into] with them, and on a sufficient consideration, respecting a matter within the scope of their powers. The subscription, which was conditional, has become absolute by the location of the depot at the place designated in the instrument. Judgment affirmed; the other judges concurring.

BRYANT'S POND STEAM-MILL CO. v. FELT.

(Supreme Judicial Court of Maine, 1895. 87 Me. 234, 32 Atl. 888, 33 L. R. A. 593, 47 Am. St. Rep. 323.)

This was an action of assumpsit by Bryant's Pond Steam-Mill Company against John G. Felt, brought to recover of the defendant the sum of $200, as appeared by his alleged subscription upon an original subscription book, and upon the outer cover of which was the following writing: "Subscription for a steam mill to be erected at or near Bryant's Pond."

The original agreement was as follows: "We, the undersigned, hereby agree to pay for the number of shares set opposite our names, —said shares to be ten dollars each, and nonassessable,—for the purpose of erecting suitable buildings, with steam power, for the manufacturing of the various kinds of wood to be used in the contract of one C. H. Adams; he paying three per cent. annually as rent on all money so paid; said moneys to be paid when needed for the purpose above named,—providing the town will abate taxes on said buildings and stock for the term of ten years."

Plea, general issue, and the following brief statement: "And for a brief statement of special matter of defense, to be used under the general issue pleaded, the defendant further says that said defendant never subscribed for, nor promised to pay for, any shares in the said Bryant's Pond Steam-Mill Company; that the signature of said defendant was procured and affixed to said paper declared on, if at all, on Sunday, and whatever contract was made, if any, was made on Sunday, and therefore void; that subsequent to the time his said name was affixed to said paper, and prior to the commencement of this suit, and prior to the organization of this company,

this defendant revoked said subscription, and notified the plaintiff and the solicitors for said stock that he should not accept the same, and requested his name stricken from the list of subscribers; that no person is named in said subscription paper as payee, and no contract was ever entered into with any person or persons; that no sum is named in said paper declared upon as a limit to the amount to be raised and is indefinite and uncertain; that a sufficient sum was not raised or subscribed for erecting buildings with steam power for the manufacturing of the various kinds of wood, as alleged, and plaintiff was obliged to and did mortgage the property to complete the amount; that, at the time the plaintiff company pretended to organize, this defendant was not recognized as a subscriber, did not participate in the organization, and is not named therein as one of the subscribers to the stock of the same; that there were conditions attached to said subscription paper which are essential to be performed, and which have never been performed, on the part of this plaintiff, or any other parties interested in said subscription, or on the part of the town of Woodstock; that said paper, purporting to be a subscription of shares of stock, is without consideration and void."

Judgment for defendant.

WALTON, J.[27] The only question we find it necessary to consider is whether a subscriber to the capital stock of an unorganized corporation has a right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. We think he has. Such a subscription is not a completed contract. It takes two parties to make a contract. A nonexisting corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it.

The right of subscribers to the capital stock of a proposed corporation to withdraw their subscriptions at any time before the organization of the corporation is completed has been affirmed in several recent and well-considered opinions. The right rests upon the impregnable ground of the legal impossibility of completing a contract between two parties, only one of which is in existence. There can be no meeting of the minds of the parties. There can be no acceptance of the subscriber's proposition to become a stockholder. There can be no mutuality of rights or obligations. There can be no consideration for the subscriber's promise. As said in one of our own decisions, it is a mere nudum pactum,—a promisor without a promisee; a contractor without a contractee. In fact, every element of a binding contract is wanting. If the subscriber's promise to take and pay for shares remains unrevoked till the organization of the proposed corporation is effected and his promise has been accepted,

[27] A part of the opinion is omitted.

then we have all the elements of a valid contract: Competent parties; mutuality of duties and obligations; a valid consideration, the promise of one party being a sufficient consideration for the promise of the other; a promisee as well as a promisor; a contractee as well as a contractor. In fact, all the elements of a valid contract are present, and the subscription has become binding upon both of the parties. But, till the corporation has come into existence, all these elements are necessarily wanting; and the subscriber's promise amounts to no more than an offer, which, like all mere offers, may be withdrawn at any time before acceptance. When accepted, it becomes binding. Till accepted, it remains revocable. This conclusion is sustained by reason and authority. * * *

It is urged by the counsel for the plaintiff corporation that such subscriptions create binding and enforceable contracts between the subscribers themselves, and are therefore irrevocable, except with the consent of all the subscribers, and some of the authorities cited by him seem to sustain that view. But we find on examination that such views, when expressed, are in most cases mere dicta, and that the cases are very few in which such a doctrine has been acted upon. Reason and the weight of authority are opposed to such a view. Of course, subscription papers may be so worded as to create binding contracts between the subscribers themselves. But we are not now speaking of such subscriptions, or of voluntary and gratuitous subscriptions to public or charitable objects, which, when accepted and acted upon, become binding. We are now speaking only of subscriptions to the capital stock of proposed business corporations. With regard to such subscriptions, we regard it as settled law that they do not become binding upon the subscribers till the corporations have been organized, and the subscriptions accepted, and that till then the subscribers have a right to revoke their subscriptions. And in view of the fact that such subscriptions are often obtained by overpersuasion, and upon sudden and hasty impulses, we are not prepared to say that the rule of law which allows such a revocation is not founded in wisdom. We think it is. * * *

Other grounds are urged in defense of the action, but it is unnecessary to consider them. Judgment for defendant.

GLENN v. BUSEY.

(Supreme Court of the District of Columbia, 1886. 5 Mackey, 233.)

COX, J.[28] * * * In the declaration in this suit, the averment is that the defendant's testator was a subscriber to the capital stock, and undertook and promised to pay the said company, for each and every share so subscribed, the sum of $100, etc. Then it goes on to

[28] A part of the opinion is omitted.

set up the assignment made by the express company to the trustees, and avers that the defendant's testator assented and agreed to said deed of trust and thereby became bound, and undertook and promised to pay said trustees for each and every share of stock above stated subscribed for by him, a balance of over $100 on each share of stock, etc. Then it goes on to recite also the decree in the Richmond court and the substitution of the plaintiff for the original trustees.

The declaration was demurred to. Of course this admitted all the facts stated in it, and the demurrer was overruled. The cause was then brought to issue by filing a general issue and several other special pleas, and comes here to be decided in the first instance upon an agreed statement of facts. The ground of the defendant's alleged liability is a stock subscription signed by her testator in the following form, viz.: "We, the undersigned, hereby subscribe the amount and the number of shares opposite our names to the stock of the National Express Company, and bind ourselves, our heirs, etc., to pay said amount in such installments as may be called for by said company, and to pay 1 per cent. at the time of subscription."

It will be observed that no promisee is named in the instrument. The corporation is not in existence at the time of the subscription. It is only after this is complete that the subscribers become a corporation. A promise cannot be made directly to a person, natural or artificial, not in existence; and therefore the corporation cannot be considered the promisee.

The nature of these subscriptions may be said to be that they are mutual promises by the subscribers to each other, to pay the amounts subscribed; and each subscription is the consideration for the others. But to whom is the payment to be made? The payee is not expressed, and the payment is certainly not to be made to the other subscribers.

In the absence of any designation, the payee must be understood to be the corporation when it comes into existence. Although a promise cannot be made to a person not in existence, there is no reason why a promise may not be made to a living person to pay money to another person, natural or artificial, when he or it comes into existence. This is one of those cases in which a promise made to one person for the benefit of a third can be enforced by suit by the latter. In fact, in the case of a stock subscription, it would be impracticable to enforce it in any other way.

The statutes of Virginia evidently contemplated the subscription as a debt due to the company. It is provided that on every subscription for shares in any joint stock company (not otherwise provided for), there shall be paid at the time of subscribing, to the commissioners appointed to receive subscriptions, $2 on each share, and the

residue thereof as required by the president and directors. See 2 R. C., p. 212, § 1.

And immediately after the election of president and directors, the money so paid is to be paid by the commissioners who may have received the same, to such person or in such manner as they may require, that is, the president and directors; and in case of failure so to pay, the company may recover the same against the commissioners by warrant or action or motion in lieu of an action. And if the money which the stockholder has to pay on his shares be not paid as required by the president and directors, "it may be recovered by warrant, action or motion as aforesaid," that is, by the company, in the same way in which the money is to be recovered from the commissioners; or the shares may be sold at auction, etc., and if the sale does not produce enough "the company may recover against such stockholder whatever may remain unpaid," etc. The declaration in this case also avers that this was a promise to pay to the company; and the agreed statement of facts also makes the company the payee.

In some jurisdictions, it is held that a subscription does not give a cause of action, but that a default simply involves a forfeiture of the stock. This legislation makes the subscription an actionable agreement, and gives the right of action exclusively to the company.

Views as to the nature of a stock subscription somewhat variant from the foregoing, but leading to the same result, have been expressed in the Massachusetts Supreme Court.

In the cases of Thompson v. Page, 1 Metc. (Mass.) 565, and Ives v. Sterling, 6 Metc. (Mass.) 310, the subscriptions were in terms made payable to such persons as might be thereafter authorized by the corporation to receive them; and the persons so authorized were sustained in actions brought by them.

In Athol Music Hall Co. v. Carey, 116 Mass. 471, the subscription contract was by the subscribers to and with each other, to associate themselves into a corporation and to pay to the treasurer of said corporation the amount set against their respective names, etc. The action for the unpaid subscription was brought by the corporation. The court said:

"In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, 'to and with each other,' is not a contract capable of being enforced or intended to operate literally as a contract to be enforced between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association

of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case, to wit, as a contract with the common representative of the several associates. * * *

"In this agreement the treasurer of the corporation to be established is expressly made a payee. The corporation is the aggregate of the several individuals entering into the agreement, one of whose terms was that they should thus associate and confer their individual rights upon the corporation. We are of opinion that the corporation, and the corporation alone, is the proper party to bring an action upon such an agreement. The corresponding agreements of the other subscribers, the organization of the corporation, and the allotment to the defendant of the shares for which he subscribed, furnish sufficient consideration for his promise to take and pay for those shares. Although his promise was originally voluntary, * * * yet having been accepted and acted on by the party authorized so to do before he attempted to retract it, he has lost the right to revoke. His proposition has become an accepted mutual contract, and is binding upon him as well as upon the corporation."

We may assume, then, that although the subscribers are the promisees, the payee is the corporation, and it has the same relation to the subscriber as if the promise had been made to the corporation after its legal existence was complete. * * * Judgment for the defendant.

HUDSON REAL ESTATE CO. v. TOWER et al.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434.)

Action by the Hudson Real Estate Company against Herman C. Tower and others, copartners, to recover the amount of a subscription by defendants. Judgment for plaintiff. Defendants except. Exceptions sustained.

As an answer and defense to the plaintiff's claim the defendants offered to prove the following, viz.: That Dr. Harriman, as a solicitor of subscriptions for the capital stock of the corporation, which was to be formed at some time after the subscription was made, asked the defendant Herman C. Tower to subscribe; that, in the course of conversation relative to the matter of subscribing, Tower said that if the subscribers were going to mortgage the property to be bought with the subscriptions his subscription would be merely nominal, but that if they would raise the full amount by subscription, and not mortgage the property, he would subscribe for 10 shares, or $500 worth; that Dr. Harriman thereupon asked him to

subscribe with that understanding, but he declined to do it that day; that, the doctor urging again that he should subscribe upon that understanding, Tower said that he would put down his name if it was understood between them that that was the condition of his subscription, and upon this assurance from Dr. Harriman he did subscribe at the time for that amount; that thereafter Dr. Harriman reported to the meeting of the subscribers the condition of the defendant's subscription, and that in consequence of that report the meeting voted "that there shall be no mortgage on the property;" that thereafter, and before anything was done by the subscribers, one of their number, then active in their affairs and now president of the corporation, informed Tower, the defendant, that they intended to rescind the vote whereby they voted not to mortgage; that thereupon the defendant Tower told this gentleman that if they so voted he would not pay a penny of his subscription; that this information had come to the ears of a number of the subscribers; that thereafter, namely, upon the 31st of August, 1889, they voted "that the vote whereby we voted August 14, 1889, not to place a mortgage on the property be rescinded;" that thereafter the subscribers formed a corporation, and the corporation did on the 1st day of April, 1890, place a mortgage for $17,000 upon said property in consequence of a legal and proper vote so to do. The defendants further offered to show that nothing had been done by the subscribers in consequence of said subscriptions before said revocation by defendants.

ALLEN, J. At the time when the defendant signed the subscription paper declared on it was not a contract, for want of a contracting party on the other side; but it has now been established that a subscription of this sort becomes a contract with the corporation when the corporation has been organized, and in this way the objection of the want of a proper contracting party is finally avoided, provided everything goes on as contemplated, without any interruption. Until the organization of the corporation, the subscription is a mere proposition or offer, which may be withdrawn, like any other unaccepted offer. Unless the signer is bound upon a contract, he is not bound at all. It is open to him to withdraw. It is not on the ground that there was no sufficient consideration. The seal would do away with any doubt on that score. But it is on the ground that for the time being, and until the corporation is organized, the writing does not take effect as a contract, because the contemplated party to the contract, on the other side, is not yet in existence, and for this reason, there being no contract, the whole undertaking is inchoate and incomplete; and, since there is no contract, the party may withdraw. Music Hall Co. v. Carey, 116 Mass. 471; Ives v. Sterling, 6 Metc. 310; Thompson v. Page, 1 Metc. 565; Academy v. Davis, 11 Mass. 113; Phipps v. Jones, 20 Pa. 260.

In the present case there was evidence which would warrant a

finding that the defendant thus withdrew before the time came when his subscription would have become a contract. Exceptions sustained.

NEBRASKA CHICORY CO. OF SCHUYLER, NEB., v. LEDNICKY.

(Supreme Court of Nebraska, 1907. 79 Neb. 587, 113 N. W. 245.)

Commissioners' Opinion. Department No. 1. Appeal from District Court, Cuming County; Graves, Judge.

Action by the Nebraska Chicory Company of Schuyler, Neb., against Anton Lednicky, to recover an unpaid balance on a stock subscription. Judgment for defendant and plaintiff appeals. Reversed and remanded for new trial.

EPPERSON, C.[29] In February, 1897, certain citizens of Schuyler, Neb., united in a movement for the organization of a company for the manufacture of chicory at that place. Articles of incorporation were prepared and discussed on one or more occasions by the interested parties, and during said month a written agreement, of which the following is a copy, was prepared and circulated and signed by a considerable number of persons; the signature of the defendant being attached thereto as below indicated: "We, the undersigned, do hereby agree to take shares of stock in the Nebraska Chicory Company of Schuyler, Nebraska, to be organized on the plan set forth in the articles of incorporation, and we agree to pay for the number of shares set opposite our respective names in accordance with the by-laws, rules and regulations of the company, which provide for a division of the capital stock of $50,000.00 in shares of $50 each, to be paid in monthly installments of 4 per cent. per month, beginning the first Saturday of March, 1897. [Signed] Anton Lednicky, 5 shares." Some time after the defendant signed the foregoing, and on or about March 8, 1897, a certificate of incorporation was filed with the county clerk, and with the Secretary of State on March 25th.

Section 4138, Cobbey's Ann. St. 1903, provides that upon this latter filing the organization should be deemed completed, and the persons whose names are subscribed thereto be deemed a body corporate. Section 4140 is as follows: "The persons named in the certificate of incorporation, or a majority of them, shall be commissioners to open the books for the subscription to the capital stock of said company, and at such time and places as they deem proper, and the said company are authorized to commence operations upon the subscription of ten per cent. of said stock."

[29] A part of the opinion is omitted.

No stock subscription book, other than the paper above set out, was opened by the authority of the corporation, but that body proceeded to transact business by the purchase of grounds and the erection of buildings and supplying the same with fixtures and machinery, chicory, etc., and the defendant, for eight months consecutively, paid into its treasury monthly installments of $10 each pursuant to the terms of his agreement. On June 29, 1897, the president and secretary executed and delivered to him a paper certifying that he had subscribed for five shares of the capital stock of the company and would be entitled to the same "upon the surrender of this certificate and compliance with the rules and by-laws of this company." For this "certificate of entitlement," as it was called, he subscribed and delivered to the company a written receipt. He ceased to pay on and after the ninth installment, and this is an action to recover the unpaid residue upon his promise of subscription above copied. At the close of plaintiff's evidence, the court directed a verdict for defendant. Plaintiff appeals.

The principal question for determination is whether the written agreement for subscription to the capital stock of the corporation is a contract which the corporation can enforce. It appears that more than 10 per cent. (about $20,000) of the capital stock had been subscribed before the company began business; that the paper signed by defendant and other subscribers was the only subscription book used or kept by the company; that defendant signed the instrument before the time of the filing of the articles of incorporation, and had paid $80 on his subscription before this suit was instituted. It has been held (Bolton v. Nebraska Chicory Co., 69 Neb. 681, 96 N. W. 148) that this identical corporation is a manufacturing corporation; the court saying: "The statute here in question was obviously designed to encourage the promotion of manufacturing enterprises of all kinds in the widest sense by relaxing the rules as to organization. There is every reason for giving it a liberal construction, and no fraud can result from so doing."

Defendant contends, however, that one who signs a subscription paper, whereby he agrees to take a certain number of shares in a corporation thereafter to be formed, does not become liable as a shareholder even after the corporation is formed, and the corporation cannot maintain an action against him upon the subscription paper. There are courts, notably Kansas, Massachusetts, Michigan, Pennsylvania, and West Virginia, which hold to this doctrine. Nemaha Coal, etc., Co. v. Settle, 54 Kan. 424, 38 Pac. 483; Hudson Real Estate Co. v. Tower, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379; Shurtz v. Schoolcraft & T. R. R. Co., 9 Mich. 269; Parker v. Northern Cen. M. R. R. Co., 33 Mich. 23; Northern Cent. M. R. Co. v. Eslow, 40 Mich. 222; Fair Ass'n v. Walker, 88 Mich. 62, 49 N. W. 1086; Tavern Co. v. Burkhard, 87 Mich. 182, 49 N. W. 562; Traction Co. v.

Green, 143 Pa. 269, 13 Atl. 747; Auburn Bolt, etc., Works v. Shultz, 143 Pa. 256, 22 Atl. 904; Greenbrier Ind. Exposition v. Rodes, 37 W. Va. 738, 17 S. E. 305. See decisions cited in 10 Cyc. p. 385, note 97; Id., p. 386, note 99; also, Thrasher v. Pike County R. R. Co., 25 Ill. 393; Sedalia, W. & S. R. R. Co. v. Wilkerson, 83 Mo. 235; Coyote G. & S. Mining Co. v. Ruble, 8 Or. 284.

The doctrine of these cases cannot be regarded as settled in American law. "This rule proceeds upon the narrow and strict ground that a contract, such as will bind the intending obligors, must be tendered to the other contracting party, to an artificial being not yet in esse, and in the precise statutory mode, or not at all." 10 Cyc. 386, note 2.

It is said that this court is committed to the rule of the cases above cited, and our attention is called to Livesey v. Omaha Hotel Co., 5 Neb. 50, and Macfarland v. West Side Improvement Association, 53 Neb. 417, 73 N. W. 736. In Livesey v. Omaha Hotel Co., supra, the sole ground upon which the defendants were held not liable upon their subscription was that the specified amount of capital stock was not subscribed for, and in Macfarland v. West Side Improvement Ass'n, supra, the same principle was announced, to wit, that the subscriber was not liable upon his subscription until the capital stock was fully subscribed for, "unless by law or charter provisions the corporation is permitted to proceed with its main design with a less subscription." In that case, however, it was held that the defendant was estopped by his conduct to deny his liability. Neither of the above cases have any application to the case at bar, since the statute under which this corporation was formed provides that the corporation may commence operations upon the subscription of 10 per cent. of its capital stock. In Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279, 62 N. W. 480, it is held that a contract as follows: "For value received, we, the undersigned subscribers hereto, bind ourselves to purchase the number of shares set opposite our names in the Lincoln Shoe Manufacturing Company at $50 per share"—upon several conditions recited, was a subscription to the stock of the corporation.

This case, however, may be distinguished from the case in hand. In that case, the subscription paper was signed after the articles of incorporation were filed. In the case at bar, it was alleged, and we understand the evidence to show, that the defendant placed his name to the subscription paper prior to the filing of the articles of incorporation. Therefore whether defendant herein is liable to the corporation on the subscription paper we deem an open question in this state. * * *

In Planters' & Merchants' Independent Packet Co. v. Webb, 144 Ala. 666, 39 South. 562, it was held: "Any agreement by which a person shows an intention to become a stockholder in a corporation is sufficient as a contract of subscription as against both him and the

corporation." A subscription by a number of persons to the stock of a corporation, to be thereafter formed by them, constitutes a contract between the subscribers themselves to become stockholders when the corporation is formed, upon the conditions expressed in the agreement, and as such it is binding and irrevocable from the date of its subscription. It is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it, becomes as to each subscriber a contract between him and the corporation. See Threshing Machine Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701. Such a contract is based upon a sufficient consideration. Such subscriptions are mutual promises among the subscribers as toward each other, and this mutuality of promise among the subscribers constitutes a sufficient consideration for such a subscription. There is in the act of the particular subscriber, in subscribing with others, a mutuality of promise which obliges him to make good his promise to the corporation after it comes into its existence. 10 Cyc. 394, note 58, and cases there cited.

"Whenever an intent to become a subscriber is manifested, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. It is, as in the case of other contracts, very much a question of intent. Formal rules are for the most part disregarded. And in general a contract for subscription may be made in any way in which other contracts may be made. Any agreement by which a person shows an intention to become a stockholder is sufficient to bind him and the corporation." 1 Cook on Corporations, § 52; 26 Am. & Eng. Encyc. Law (2d Ed.) 902, 903. That "a subscription for stock implies a promise to pay for it, even though the subscription was before incorporation, is the rule sustained by the great weight of authority." 1 Cook on Corp. §§ 71, 75; 26 Am. & Eng. Encyc. Law (2d Ed.) 902; 1 Morawetz on Corp. §§ 47, 54. We gather this proposition from the decisions, and think it is sustained by the weight of authority. A subscription to corporate shares, made before the corporation comes into existence, but accepted by the corporation after coming into existence, either expressly by issuing the share certificates, or impliedly by recognizing the subscriber as a shareholder, makes him a shareholder, and the corporation may maintain an action upon the subscription against the signers.

It is argued, however, that the subscription in the case at bar is invalid because not entered by the commissioners in the corporate books as provided by section 4140, Cobbey's Ann. St. 1903. As a general rule, unless the charter or governing statute so provides, it is not necessary to the validity of the subscription that it should be originally made in a book prepared for that purpose. 10 Cyc. 392. We believe our statute should be liberally construed, and are of opinion that the true rule is that, although the statute provides for the

opening of books, the use of subscription papers in the first instance, instead of a book, does not make the subscription void. 10 Cyc. 392, citing, in note 43, Brownlee v. Railroad Co., 18 Ind. 68; Hamilton, etc., Plank Road Co. v. Rice, 7 Barb. (N. Y.) 157; Railroad Co. v Smith, 15 Ohio St. 328; Railroad Co. v. Yandal, 5 Sneed (Tenn.) 294; Stuart v. Railroad Co., 73 Va. 146. "Inasmuch as Acts 1903, p. 310, containing provisions for stock subscriptions, does not provide that unless the specified conditions are complied with a subscription shall not be binding, a subscription is binding, though not formally, or even regularly, made." Planters' & Merchants' Independent Packet Co. v. Webb, 144 Ala. 666, 39 South. 562.

The trial court was in error in directing a verdict for defendant, and we recommend that the judgment be reversed, and the cause remanded for a new trial.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for a new trial.

REHBEIN et al. v. RAHR et al.

(Supreme Court of Wisconsin, 1901. 109 Wis. 136, 85 N. W. 315.)

Action by A. M. Rehbein and others against William Rahr and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

The T. C. Shove Company, a state banking corporation, having assigned April 12, 1892, plaintiffs, being creditors of said bank to the extent of $2,800 out of an aggregate of about $485,000, brought suit against defendants, nominally impleading with them the corporation and the other stockholders thereof, who, however, were not served with process, they being alleged to be insolvent. The action was brought by plaintiffs for the benefit of the creditors of said corporation, and to enforce the statutory liability of the defendants Rahr, under subsection 47, § 2024, Rev. St. 1898, for an additional amount equal to the par value of the stock claimed to have been held by them.

It appeared that in 1884, preliminary to the organization of the Shove Bank by T. C. Shove, theretofore a private banker, these defendants, with their brother, Max Rahr, constituted a business partnership under the name of William Rahr's Sons; that Shove spoke to William Rahr about his firm becoming a stockholder for 25 shares in the proposed banking corporation; that William, after talking with Reinhardt, expressed his own and Reinhardt's approval of such proposition, and they, at the request of Shove, signed their names to a certificate of incorporation under the bank incorporation statute (now section 2023a), with the understanding, as found by the court,

that such signature was only for the purpose of performing their individual part towards constituting the firm of William Rahr's Sons a stockholder, and that, in order to bind the firm, the other member was to subscribe and acknowledge, to accomplish which blanks were left for the name of Max Rahr.

The court further found that there was no intent or understanding on the part of any one that William Rahr or Reinhardt Rahr should, individually or jointly, become contracting parties by virtue of their signatures. Max, on being informed of what they had done, did not approve, and thereupon, a day or two after their signatures had been affixed, William notified Shove, who held the paper, that they had reconsidered, and declined and refused to become stockholders. All this was nearly a month before the papers were filed with the register of deeds to create the corporation. Thereafter, on June 3, 1884, Shove, notwithstanding said notification, did file the certificate in question bearing the names of William Rahr and Reinhardt Rahr, and specifying among the list of stockholders "William Rahr's Sons, of Manitowoc, Wis., holds 25 shares." Subsequently, about July 1, 1884, Shove brought and tendered to William Rahr a certificate of stock for 25 shares. Rahr refused, saying that the firm had declined to become a stockholder, and would not take it, and persisted in such refusal, although Shove offered to accept the note of the firm for this amount, whereupon Shove took the certificate of stock away. It appears that it was never destroyed, and that the stub in the stock book continued to show certificate No. 16, 25 shares, in the name of William Rahr's Sons, although it did not show any signature to the receipt therefor printed on the stub. Thence onward the officers of the bank continued, in their reports to the state treasurer, to include William Rahr's Sons among the list of stockholders, but of none of such facts had the respondents any knowledge. It does not appear that lists of stockholders were at any time after the incorporation filed with the register of deeds.

The insufficiency of the general assets of the bank to pay more than about 29 per cent. of its debts was found. There was evidence that most of the plaintiffs had newspaper information at the time of the incorporation of the bank in 1884 that William Rahr's Sons were stockholders, and plaintiff Stolze had seen the reports of the state treasurer from time to time thereafter containing their names, and had examined the record of certificate for incorporation in the register's office. The court found that neither William Rahr, nor Reinhardt, nor both of them, were by the plaintiffs supposed to be holders or owners of any of the capital stock of said bank. There was no evidence as to whether any other creditors had knowledge or information, before the assignment, of any connection of respondents with the bank. The court found as a fact that at none of the times involved did the respondents William Rahr or Reinhardt Rahr, either

jointly or severally, own or hold any of the capital stock of the insolvent banking company. Judgment was entered dismissing the complaint, from which the plaintiffs appeal.

DODGE, J.[80] * * * The primary question,—and, indeed, that most litigated in the present case,—is, were the respondents stockholders of the defendant corporation? The circuit court evidently faced exactly this proposition, and held that the respondents never became stockholders, predicating his conclusion on one specific finding of fact, namely, that they did not execute the certificate of incorporation. True, they signed their names to it, but he found as fact that the signature was preliminary only, and understood by all parties to be as if not done until consummated by the assent and signature of the third member of the firm of William Rahr's Sons, Max Rahr. Assuming the facts of the transaction to be as found by the court, the first and vital question is whether his conclusion of nonstockholding by these defendants may lawfully be drawn therefrom, notwithstanding the fact that by the filing of the paper bearing their signatures they were apparently shareholders.

It must be conceded that the general rule is perfectly well settled by the decisions of this state that a document which requires delivery to be effectual is wholly ineffectual unless voluntary delivery thereof be made; that otherwise such paper never comes into existence as a legal instrument. This was decided as early as Everts v. Agnes, 4 Wis. 343, and has been reiterated in Railroad Co. v. Palmer, 19 Wis. 574; Walker v. Ebert, 29 Wis. 194; Kellogg v. Steiner, 29 Wis. 626; Tisher v. Beckwith, 30 Wis. 55; Andrews v. Thayer, 30 Wis. 228; Chipman v. Tucker, 38 Wis. 43; Hillsdale College v. Thomas, 40 Wis. 661. * * *

The findings in the case at bar disclose a situation which, on the authority of the Wisconsin cases above cited, would probably defeat a promissory note, mortgage, or other like paper, but would not defeat a probate or public bond similarly deposited. The question, then, recurs whether the rule so well established in Wisconsin, that ordinarily a paper shall have no efficacy whatever unless made current by voluntary delivery, is to be subjected to further exception in favor of documents like that before us, which, in order to become valid and effective, was not to be delivered to an adversarily interested individual, who was to acquire his rights thereby, but was to be delivered to the public by filing with the register of deeds, upon whom rests no duty to scan or scrutinize the instrument, or to ascertain any of the facts bearing upon its due execution or upon the authority of him who files it, but merely to receive and give to it apparent, ostensible authenticity and force by spreading it upon the public records.

[80] A part of the opinion is omitted.

It would seem that the question, thus stated, answers itself, in the light of the reasons which induced this court to insist on the validity of probate bonds although no voluntary delivery thereof had occurred. Certainly, more duty and opportunity for scrutiny, precaution, and inquiry rests upon the county judge before the acceptance of a bond which shall give existence and authority to an administrator, guardian, or trustee than rests on the register of deeds in accepting and filing articles of incorporation. Again, those who are to be affected thereby, and who are to rely on the state of facts which depends upon the existence of such paper, are even more remote and unable to protect themselves in the case of the establishment of a bank than in the case of the creation of a court officer. They may have no interest until years after the event, and they may well be as helpless, and as entitled to invoke rules of public policy, as are the widows, orphans, or beneficiaries whose property depends upon the sufficiency of the bond. Such reasons lie at the foundation of the policy of this and other states to place about the business of banking extraordinary restrictions and safeguards to minimize as far as possible the grievous results of insolvency.

The disturbance of the business world, and the impoverishment of those who rely on the semipublic character of banks for the safekeeping of their moneys, are considerations which involve so much of public policy and general welfare that they invite and have received the most anxious care at the hands of both legislature and judiciary. By virtue of his bond the county judge confers upon an administrator custody and control of moneys and property of the few people interested in an estate. By virtue of the public record of incorporation papers the state confers upon a bank in practical effect the custody of the moneys of a whole community, whose members, whatever their right, have practically not the power of ascertaining its safety, but ex necessitate rely therefor on the status the state has given it. This comparison leaves no doubt of the duty of a court to adopt for the protection of the latter situation quite as stringent rules as for the former.

We are unable, therefore, to escape the conclusion that all the considerations which justified the decision in Belden v. Hurlbut necessitate the holding that public policy demands that the certificate of incorporation of a bank, when filed and acted on, must be given full effect, according to its terms, against those who execute the same, although its filing may have occurred in contravention of the understanding and directions of some of them. This is on the ground of estoppel, but estoppel quoad the state, the benefit of which extends to all those who deal with the corporation on the faith of its status as such; just as the contract which would result from intentional execution and filing of the certificate inures to the benefit of those who deal with the corporation in after years, though they may never have

known who were the parties thereto as incorporators, and may never have relied on the fact that any particular person was thereby made liable to them.

From the foregoing it results that all of the signers of the certificate for incorporation of the Shove Banking Company are placed in exactly the same position as if that document had been filed by their direction and with their assent. Upon that attitude, however, it is contended by respondents that the paper itself excludes the idea that William Rahr and Reinhardt Rahr were to become holders of the entire 25 shares of stock, because the stock is listed as to belong to William Rahr's Sons, a firm which they could not bind. The question of their intent, and of the force and effect of their act, must be resolved from the instrument itself, the terms of which cannot be varied or contradicted by parol nor by inference as to the intention or purpose of those executing.

The original force and effect of such instrument is, at the least, to express a contract by its signers to take the amount of stock which that certificate declares them to hold. Further, the statute evidently contemplates that the certificate is to be signed by the holders of all of the stock as the corporation is to be originally organized. Section 2024, subsec. 18, provides that "any number of persons may associate * * * and may become incorporated." Section 2024, subsec. 19: "Such persons * * * shall make a certificate," etc. These provisions leave no doubt that those who are to constitute the original corporation must sign the certificate. But it clearly appears that those who constitute the original corporation must be holders of the capital stock thereof, for the certificate above mentioned is required to state the amount and number of shares of the capital stock and the names and residence of the stockholders.

Clearly, this contemplates and requires that the corporation, when created, shall consist of the shareholders already ascertained, and that it shall also consist of "such persons" a make the certificate, and thereby "become incorporated." The two classes, shareholders and makers of the certificate, must, of necessity, be identical, in order to give effect to the various calls of this statute. This legislative purpose is rendered the more certain by the fact that in no other manner is any requirement made, as in the case of other corporations, that any given amount of capital stock shall have been subscribed before engaging in business. If this is not what the statute demands, one man, holding one share of stock, may execute and file a certificate declaring who are the holders of the rest, it is true, but not binding them, and may thus alone "become a body politic and corporate," with all the powers and privileges specified (section 2024, subsec. 19, cl. 5),—a result too absurd to be contemplated.

Taking together these two propositions, namely, that the certificate declares that the subscribers have together agreed to take all the

stock and the amount which each has agreed to take, and finding that the amount of stock to be held by each of the other signers is specified in the certificate, no interpretation can be adopted other than that William Rahr and Reinhardt Rahr, who were sons of William Rahr, agreed to become stockholders for the other 25 shares in the certificate mentioned. If the contract is ambiguous as to whether by the expression "Wm. Rahr's Sons" is intended those of his sons who have signed, or a partnership consisting of others as well, that ambiguity is to be resolved most strongly against those responsible for it, and so as to give some, instead of no, effect to the acts of the parties. If, by their signatures, the respondents could not constitute the firm a stockholder, it must be presumed that they did not intend to, but did intend to bind whom they could within the description adopted.

Another proposition irresistibly results from the conclusion that the respondents' act in signing the paper was a completed one, namely, that the paper was thereby agreed to be used for the purposes for which the law required it to be executed, and that the act of Shove or any of the other signers of the paper in placing it in the register's office was in accordance with its terms, and thereby created a corporation consisting of the signers as shareholders. That immediately upon the coming into existence of such a corporation all of the signers to this certificate became stockholders therein, is obviously the contemplation of the statute.

The organization of banking corporations differs radically, in that respect, from the method prescribed for others. Generally, corporate existence is created by the execution and filing of an instrument by men who may never hold stock, and the relationship of stockholder is created either by the purchase of stock or the subscription therefor accepted by the corporation. Paper Co. v. Rose, 95 Wis. 145, 70 N. W. 302, 37 L. R. A. 162. In the case of the banking corporation, however, the statute provides that the certificate shall be of actual stockholding, and that statute, upon the filing of the papers so as to constitute the corporation, itself undoubtedly supplied the acceptance, so that the relationship immediately arises. The contract, so soon as the state becomes a party to it by the filing of the certificate, is an executed one. It is not like the promise to marry, which may be effectively broken, but like the contract of marriage, which creates a status irrevocably. 1 Mor. Priv. Corp. § 56; Railway Co. v. Dudley, 14 N. Y. 336, 346, 355; Spear v. Crawford, 14 Wend. (N. Y.) 20; Stanton v. Wilson, 2 Hill (N. Y.) 153.

Some argument is submitted as to the right or power of these respondents to rescind their contract of subscription, but the question does not present itself for decision, for the present record presents no evidence of any effective rescission. If respondents made any attempt to that end, it could not be effective without consent of their

associates and of the corporation, nothing of which is disclosed by the record.

We conclude, therefore, that by the certificate of incorporation, signed by the respondents, and filed with the register, they agreed, with their associates, that it might be used to create a banking corporation, and that upon its creation they should ipso facto be and become stockholders therein to the amount of 25 shares; that, upon the legal filing of such document, they did become such; that there has been neither rescission of such agreement nor termination of such status; and, as a result, that they were, at all times material to their liability, shareholders in such corporation. * * *

BY THE COURT. Judgment reversed, and cause remanded, for further proceedings according to law.

MARYSVILLE ELECTRIC LIGHT & POWER CO. v. JOHNSON.

(Supreme Court of California, 1892. 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215.)

Action by the Marysville Electric Light & Power Company against one Johnson. Complaint dismissed, and plaintiff appeals.

DE HAVEN, J.[81] This is an action brought by the plaintiff against the defendant upon the following agreement, alleged to have been signed by him and others: "For the purpose of forming a corporation to have for its object the furnishing of the incandescent system of electric lighting to those who may desire the same, and to provide the funds for the purchase of the necessary plant, we, the undersigned, hereby subscribe for stock to the amount set opposite to our respective names; amounts to be due and payable upon the formation of the company and the issuance of the stock."

The complaint alleges that the agreement was made and signed in contemplation of incorporating the plaintiff for the purpose of carrying on the business therein stated, and that thereafter it was duly incorporated under the laws of this state by the defendant and the other persons signing said agreement. It is further alleged "that said corporation, this plaintiff, succeeded to and acquired all the rights of said subscribers, and each of them, to the amounts so subscribed" under the said agreement, and that plaintiff has issued its stock to the subscribers, and tendered to the defendant the amount of stock subscribed for by him, and that he has refused to pay for the same. It is also alleged that plaintiff "duly made," at different times, calls for 15, 60, and 25 per cent. of the amounts so subscribed by the defendant and others. The court below sustained a demurrer to the

[81] A part of the opinion is omitted.

complaint upon the ground that the facts therein stated are not sufficient to constitute a cause of action. This ruling of the court presents the only question to be considered by us at this time.

1. The agreement above set out is certainly valid. The corresponding promises of the other signers, and the common object sought to be accomplished by all the parties to it, constitute a sufficient consideration for the promise of defendant; and upon the formation of the plaintiff corporation by the persons signing the agreement, and plaintiff's acceptance of the agreement, the defendant became bound to take and pay for the number of shares subscribed for by him. Music-Hall Co. v. Carey, 116 Mass. 471; Hotel Co. v. Friedrich, 26 Minn. 112, 1 N. W. 827; Hughes v. Manufacturing Co., 34 Md. 316; Association v. Walker (Mich.) 47 N. W. 338. And it is not material to the right of the plaintiff to maintain this action that it is not expressly named in such agreement as the promisee. The agreement is to be construed according to the evident intention of the parties to it. It just as clearly appears that it was the intention of all the parties that the promise of each should inure to the benefit of the corporation when formed, as if such intention were expressly declared; and therefore, in legal effect, the promise of defendant was to pay to the plaintiff corporation when organized. The corporation really represents the parties to the agreement. It was brought into existence by them as an agent to carry on the business named in the agreement, and through which they were to secure the benefits to arise from their mutual and corresponding promises.

There is no difference in principle between the above contract, signed by the defendant, in this case, and that construed by the supreme court of Massachusetts in the case of Music-Hall Co. v. Carey, 116 Mass. 471. In that case the agreement was that the parties signing it would form a corporation, and "pay to the treasurer of the corporation the amount of the several shares" subscribed for; and, in speaking of such an agreement, the court said: "In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, 'to and with each other,' is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced, between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the proposition offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of

the case, to-wit, as a contract with the common representative of the several associates."

In Shoe Co. v. Hoit, 56 N. H. 548, certain persons signed the following paper: "The undersigned mutually agree that they will take and pay for the number of shares set against their respective names in the capital stock of a corporation to be organized under the general statute of New Hampshire for the purpose of manufacturing boots," etc. Immediately following the names of those signing this agreement, the defendants in that action signed the following: "We, the undersigned, agree to pay in cash a gratuity of one thousand dollars." The plaintiff in that case was subsequently incorporated by the persons who had subscribed the above agreement to take its stock, and brought the action to recover the gratuity of $1,000 agreed to be paid by the defendants therein; and the court held that the action could be maintained; although the plaintiff was not named in the written promise of defendants to pay such gratuity, nor was it in existence when defendants signed the same. The court said: "The agreement was, on the one part, by the subscribers to the stock, of whom the plaintiffs are the successors, or, rather, with the plaintiff,—for the understanding and agreement was that the subscribers to the stock should unite and form the plaintiff corporation,—and, on the other part, by the defendants."

So, in this case, the agreement between the parties signing it was, in legal effect, that they would form the plaintiff corporation, and pay to it, as their common representative, the amount by them subscribed for its stock; and the plaintiff is therefore authorized to sue upon such agreement as a contract made for its benefit. * * * Judgment reversed.

BADGER PAPER CO.. v. ROSE et al.

(Supreme Court of Wisconsin, 1897. 95 Wis. 145, 70 N. W. 302, 37 L. R. A. 162.)

Action by the Badger Paper Company against David S. Rose and others to recover the price of goods alleged to have been sold and delivered by plaintiff to defendants. From a judgment in favor of defendants, plaintiff appeals.

Prior to the 1st day of September, 1893, in contemplation of organizing a corporation to publish a Democratic morning newspaper in the city of Milwaukee, a subscription list was circulated, for the purpose of obtaining signers thereto, of persons who were willing to take stock in such an enterprise. The subscription paper was headed as follows: "We, the subscribers, do hereby subscribe for the capital stock of a corporation to be organized under the laws of Wisconsin, to own and operate and publish a Democratic morning newspaper in

the city of Milwaukee. Our said subscriptions to be paid as follows, to wit, 25 per cent. at the time of the organization of said corporation upon call of the treasurer, and the remaining 75 per cent, in installments, as the same may be called upon assessment levied by the board of directors." All the defendants signed such subscription list prior to, or soon after, the 1st day of September, 1893.

For some time prior to such date Clarence L. Clark operated a publishing establishment at the city of Madison, Wis., and there published a Democratic newspaper called the "Madison Times." It was in contemplation that the plant would be removed to Milwaukee, and sold to the proposed corporation. Pursuant to such scheme, articles of organization of a corporation were duly prepared, according to the laws of this state on the subject of the organization of corporations, the original of which was filed and recorded in the office of the register of deeds for Milwaukee county, Wis., on the 5th day of September, 1893, and a properly verified copy thereof was duly filed in the office of the secretary of state. Clarence L. Clark was one of the chief promoters of the enterprise, and one of the signers of the articles of organization.

About the time such articles were filed Clark removed the aforesaid newspaper plant from Madison, Wis., to Milwaukee, and there rented rooms and fitted the same up ready for the use of the corporation. All of the business of making such removal, renting rooms, and fitting up the plant in Milwaukee, ready for operations, was conducted by Clark, up to the meeting for the purpose of perfecting the organization of such corporation, hereafter mentioned. On the 27th day of September, 1893, pursuant to a request made by Clark, as manager of the corporation, H. A. Frambach, on behalf of plaintiff, visited Milwaukee, and there contracted to sell to the Times Printing Company a quantity of paper for the use of such company. The business was done with Clark, who assumed to act for the corporation. He told plaintiff's agent that the company was incorporated, and to bill the paper to it. Thereafter, pursuant to the contract, the paper was sent to the Times Printing Company, and after the 6th day of October, 1893, the same was used by the corporation in the conduct of its business, but without notice on the part of the directors of the corporation, or any of the defendants, that any one was indebted to plaintiff therefor.

On the 6th day of October mentioned the persons who had signed the subscription paper, including defendants, convened for the purpose of organizing the corporation. Such subscription paper was then presented, and the signers participated in the organization, which was then and there completed, Clark being chosen manager. Thereafter, under the directions of Clark, the paper theretofore purchased was used. Clark subscribed for $40,000 of the stock, and turned over to the corporation the newspaper plant theretofore fitted up by him

as aforesaid, and all material on hand, with the good will of the Madison Times and its subscription list, also the franchise of the United Press Association, in payment of such subscription.

This action was brought against the defendants as stockholders, under the statute which provides that if any corporation contracts debts before half its stock is subscribed for, and 20 per cent. thereof paid in, its stockholders then existing shall be personally liable for such debts. On the trial the facts above set forth appeared by the evidence uncontroverted; whereupon the court, on motion, directed a verdict in favor of the defendants, to which plaintiff excepted. Judgment was entered pursuant to such verdict, from which plaintiff appealed.

MARSHALL, J.[83] (after stating the facts). The first question to be determined is, to whom did plaintiff contract to sell the paper? In determining that question, the date when the Times Printing Company became a corporation competent to contract, as such, is important. Section 1772, Rev. St., provides that the articles of organization, or a verified copy thereof, "shall be recorded by the register of deeds of the county in which such corporation is located; and no corporation shall, until such articles be so left for record, have legal existence." Section 1773, Rev. St., provides that, "until the directors or trustees shall be elected, the signers of the articles of organization shall have direction of the affairs of the corporation," and that "no such corporation shall transact business with any others than its members, until at least one-half of its capital shall have been duly subscribed, and at least twenty per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof, the corporation offending shall have no right of action thereon; but the stockholders then existing of such corporation shall be personally liable upon the same."

It is hardly possible that one can misunderstand the plain meaning of these provisions. Clearly, the Times Printing Company became a corporation on the 5th day of September, 1893, the day the articles of organization were filed for record in the office of the register of deeds for Milwaukee county. From that day till October 6, 1893, the signers of the articles, D. S. Rose, Clarence L. Clark, and Peter Mulholland, had lawful authority to manage its affairs. During that time it was capable of contracting obligations in its corporate capacity, subject to the statutory disability respecting the enforcement of the same, but liable, nevertheless, thereon, and its stockholders existing at the time of the making thereof personally liable as well. It follows that the Times Printing Company, as a corporation, had lawful authority on the 27th day of September, 1893, to contract with plaintiff for the paper. On that day its agent testifies that he sold the paper to such corporation, and with knowledge that, though incorporated, it had not yet been organized. * * *

[83] A part of the opinion is omitted.

The only remaining question is, were the defendants stockholders of the corporation at the time the contract was made? It is alleged, in effect, that they were such stockholders, and on that the case turns. On the subject of when a person may be said to be a stockholder in a corporation there is some conflict of opinion, but it is nowhere held that one can become such without being the owner or holder of stock or a subscriber therefor. If the defendants were stockholders, they were such by virtue of having merely signed a paper which bound them to take stock in a corporation to be formed. To be sure, the paper signed is in the form of a present subscription for stock, but all, or nearly all, the signers subscribed before the articles of organization were filed. All signed long before there was any corporate organization, and the paper expressly states that the subscribers subscribed for stock in a corporation to be formed. At most, it can only be said to have constituted an agreement to take stock. The mere signing of the paper did not make the signers stockholders.

Much learning has been displayed respecting this subject by the text writers, and many adjudications exist in the courts of this country respecting just what the status is of a mere signer to such a subscription paper under such circumstances. The subject is treated in article 21 of Thompson's Commentary on the Law of Corporations, under the title "The Contract of Subscription," commencing with section 1136. But all the authorities substantially agree that, until the subscription paper has been presented to the corporation and assented to by it, the signers are not stockholders. In Machine Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, the character of such a subscription paper was considered, and the conclusion reached that it was a binding contract between the subscribers to take stock and to pay therefor according to their respective subscriptions, and hence that they became stockholders at the instant such subscriptions were accepted by the corporation. Says Mr. Justice Stone on the same subject, in Knox v. Land Co., 86 Ala. 180, 5 South. 578: "Such an agreement is in no sense a subscription to stock. Something more must be done before it can be affirmed that the subscription is a complete contract." To the same effect are Music Hall Co. v. Carey, 116 Mass. 473; Shoe Co. v. Hoit, 56 N. H. 548; Railroad Co. v. Gifford, 87 N. Y. 294.

In Waterman on Private Corporations (section 177), it is stated, in effect, that if a number of persons mutually agree to become stockholders in a corporation to be formed, their agreement is in the nature of a continuing offer, which offer, by acceptance, consummates the contract of membership, and makes the subscribers stockholders. In McClure v. Railway Co., 90 Pa. 269, the form of the subscription paper was that of a present subscription for the stock of an existing corporation. The court held, in effect, that the sub-

scribers became stockholders from the instant of the acceptance of their subscription by the corporation, not before. In Railway Co. v. Gifford, supra, the form of the subscription was as follows: "We, the undersigned, in consideration of, and for the purpose of, becoming stockholders in the Buffalo & Jamestown Railroad Company, do hereby subscribe and take the number of shares, of $100 each share, of the capital stock of said company set opposite our respective names, and agree to pay therefor," etc. The subscriptions were obtained by one who afterwards became a director of the corporation so organized. The subscription paper was delivered to and accepted by the corporation, and the subscribers participated as such in the business of the corporation. The court held that the subscription was not valid to make the subscribers stockholders in the first instance, but that they became such by the acceptance of their subscription by the corporation.

Decisions along this line could be multiplied at great length, but suffice it to say that no well-considered case can be found which holds that a mere agreement to subscribe for, or a subscription to, the stock of a corporation to be formed, will constitute the subscribers stockholders, and as all of the defendants were so circumstanced September 27, 1893, they were not stockholders existing at the date the contract was made, upon which this action depends, hence not liable thereon under the provisions of section 1773, Rev. St. The judgment of the circuit court is affirmed.[22]

DORRIS v. FRENCH.

(Supreme Court of New York, 1875. 4 Hun, 292.)

Motion for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict directed in favor of the plaintiff.

This action was brought to recover from the defendant the amount claimed to be due from him on certain shares of stock in the Buffalo Fruit Preserving Company.

In the latter part of October, 1865, the defendant and others signed a paper whereby they agreed to unite in the formation of a company for the purpose of purchasing the exclusive right to make, use and vend Nyce's patent for preserving fruit, the paper designating the number of shares to be subscribed for by each. Subsequently, the defendant and nine others executed and acknowledged the certificate of incorporation required by the act of 1848, c. 40, authorizing the formation of corporations for manufacturing purposes. Subsequently the plaintiff was appointed receiver of the corporation, which

[22] Compare: Southwestern Slate Co. v. Stephens et al., 139 Wis. 616, 120 N. W. 408, 29 L. R. A. (N. S.) 92, 131 Am. St. Rep. 1074 (1909).

had been dissolved for failing to exercise its privileges for one year. The defendant set up, as a defense, that he was not a stockholder; that the company was never legally incorporated; and that his subscription was procured through fraud.

GILBERT, J.[84] This case is unlike that of Dorris v. Sweeney, 64 Barb. 636, in this, namely, that the defendant subscribed and acknowledged the certificate of incorporation. The statute authorizing the formation of manufacturing companies, 3 Stat. at Large (Edmonds' Ed.) p. 733, provides that the persons who shall have signed and acknowledged the certificate, and their successors, shall be a body politic and corporate. It requires that the aggregate amount of the capital stock of the company, and the number of shares of which it consists, shall be stated. But it does not require that the interest of the subscribers to the certificate, respectively, shall be set forth. That must, therefore, necessarily be fixed by some agreement separate from the certificate. Such an agreement, consummated by signing the certificate, amounts to the same thing as subscribing formal articles of association, preliminary to organizing a corporation. The agreement and the certificate constitute but one transaction, having a single object, namely, the formation of the corporation. It has long been held, and never, I believe, disputed, that the corporation, when formed, may enforce payment of the subscriptions to its capital stock against persons who subscribed its articles of association before the corporate body had a legal existence. Buffalo & P. R. Co. v. Hatch, 20 N. Y. 161; Burr v. Wilcox, 22 N. Y. 551; Strong v. Wheaton, 38 Barb. 622; Ang. & A. Corp. § 517 et seq. It was with this rule of law in view, probably that the legislature omitted any specific provision regulating the manner of becoming stockholders, while at the same time they authorized the capital stock to be paid in—one-half thereof within one year, and the other half within two years, and made the stockholders severally liable for the debts of the corporation, to an amount equal to the amount of stock held by them respectively, until the whole amount of capital stock should have been paid in (section 10), and authorized the corporation to demand from the stockholders, respectively, payment of their subscriptions, on pain of a forfeiture of their stock (section 6).

It is very evident from these provisions, that the design of the legislature was to provide protection to creditors, by devolving personal liability on the stockholders, and to give to the corporation, for the indemnity of the latter, the power of coercing payment of subscriptions. But neither of these objects could be accomplished, unless there were some means of ascertaining who had become stockholders, and the amount of stock held by them, besides the certificate of incorporation; for that might not show the names of all the stockholders, or the amount of stock held by any of them. These

[84] Part of opinion omitted.

facts might be established by proof of payments on account of stock, and the taking of the usual stock certificates; but that kind of proof would not be as satisfactory as the ordinary mode of subscribing which was adopted in this case. We are of opinion, therefore, that the original liability of the defendant as a subscriber to the stock was established. Stockholders are estopped to deny the lawful existence of corporations which they have helped to create. * * * New trial granted, costs to abide event.

HAWLEY v. UPTON.

(Supreme Court of the United States, 1880. 102 U. S. 314, 26 L. Ed. 179.)

In Error to the Circuit Court of the United States for the District of Iowa.

The case is fully stated by the court.

This case presents the following finding of facts and certificate of division of opinion thereon in the court below:

"The plaintiff is assignee in bankruptcy, as alleged in the petition.

"On the second day of January, 1871, Rossitur, agent of the Great Western Insurance Company, requested defendant to take stock in said company.

"The defendant, on certain representations by Rossitur, signed the following paper or bond:

" 'No. ———. $200.

" 'The Great Western Insurance Company.

[Stamp.]

" 'Capital Stock $500,000, with Liberty to Increase to $5,000,000.

" 'Stock Non-Assessable.

" 'Organized July 20, 1857, under Act of Legislature Approved March 4, 1857.

" 'Know all men by these presents, that for and in consideration of ten shares of the capital stock of the Great Western Insurance Company of Chicago, Ill., received by me, I am held and firmly bound, and agree to pay the Great Western Insurance Company of Chicago the sum of two hundred dollars in installments, as follows: Twenty-five per cent thereof upon receipt of stock certificate, twenty-five per cent in three months from date hereof, twenty-five per cent six months from date hereof, twenty-five per cent nine months from date, with interest ten per cent after due.

" 'Chicago, 7th Jan'y, 1871.

" 'Theo. Hawley. [Seal.]

" 'Signed and delivered in presence of'—

"At the time the said bond or paper was issued to Hawley the latter paid Rossitur twenty-five dollars, and delivered to him the bond. It was not delivered on any particular conditions. It was delivered to an agent of the company's, namely, the said Rossitur.

"The company afterwards came into possession of the bond, and entered Hawley's name on their books as a stockholder, and published him in their publications as one of their stockholders, Hawley having no knowledge of the publications. Hawley paid no other money, and no calls were made upon him prior to the bankruptcy.

"No certificate of stock was ever sent or delivered to Hawley, and he made no demand on the company for any certificate of stock.

"The bankruptcy of the insurance company was caused by fire in October, 1871.

"The defendant signed no subscription paper or any other paper than the bond above set out.

"On the foregoing facts and the pleadings judgment was rendered for the plaintiff. The judges were opposed in opinion on the following questions:

"1. Whether the delivery of a stock certificate under the above circumstances was necessary to constitute the relation of stockholder between the defendant and the insurance company.

"2. Whether the above facts constitute a defense to the action.

"The Judges [John F. Dillon and J. M. Love] being divided in opinion on the above questions, hereby certify such division to the Supreme Court, pursuant to the statute in such case made and provided."

WAITE, C. J. It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the corporation represents. If such an obligation exists, the courts can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made, or the obligation in some lawful way extinguished.

These are elementary principles. Upton, Assignee, v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384. And the only question we have to consider is whether, from the facts found it appears that Hawley, the plaintiff in error, had become an accepted subscriber to the stock of the company before the bankruptcy. There can be no doubt that he was approached by an agent of the company with a view of securing him as a subscriber. It is equally true that after the representations made to him,

he was willing to become a stockholder. The result was that he executed the paper set out in the findings, by which he acknowledged the receipt from the company of ten shares of its stock, and agreed within the time named to pay to the company $200, or twenty per cent. of its par value. As the company could not sell its stock at less than par, what was done amounted in law to a subscription for the stock, and nothing else. It is true the stock he took purported to be non-assessable; but that in law could only mean that no assessment would be made beyond the percentage he had specially bound himself to pay, unless the legal liabilities of the company required it. Upton, Assignee, v. Tribilcock, supra.

The paper he signed was delivered to the company by the agent who got it. That it was accepted by the company as a subscription is shown conclusively by the fact that his name was entered on the books as a stockholder and publication made accordingly. It matters not that he had no knowledge of such a publication. His receipt for the stock was an acknowledgment, so far as he was concerned, that he had become a stockholder, and, after an acceptance by the company, his liability was fixed whether any publication was made or not. The publication is only important as a means of showing that his subscription made to an agent had been accepted and ratified by the company. The entries on the books had the same effect. The publication only made it more notorious. The ultimate fact to be established is that a subscription had not only been made by Hawley, but accepted by the company.

Both in the pleadings and the argument the defense was put principally on the fact that no certificate of stock had been issued. It may be conceded that if a suit had been brought by the company on the express promise to pay the twenty per cent., there could have been no recovery without a tender of the certificate; but that is not this case. Here the creditors of the bankrupt company are proceeding against Hawley as a stockholder, to compel him to contribute to the fund which the law had provided for their security, what he by his subscription agreed he would pay. The suit is not brought on his special agreement to pay the twenty per cent., but on his general liability as a subscriber to pay for his stock whenever it was wanted to meet the liabilities of the company. As the certificate was not needed to perfect the subscription, its non-delivery cannot stand in the way of a recovery in this action.

We have no hesitation in answering each of the questions certified in the negative, and the judgment is consequently affirmed.

McMILLAN v. MAYSVILLE & L. R. CO.

(Court of Appeals of Kentucky, 1854. 15 B. Mon. 218, 61 Am. Dec. 181.)

This suit was brought by the Maysville & Lexington Railroad Company against McMillan, to compel the payment of ten shares of stock in said road, alleged to be due upon the subscription of the defendant. The following is the subscription paper which is the foundation of the suit: "We, the undersigned, citizens of Nicholas County, State of Kentucky, hereby subscribe for the number of shares in the capital stock of the Maysville & Lexington Railroad Company set opposite our names respectively, and hereby promise and agree to pay fifty dollars on each share so subscribed in such installments and at such times and places as may be required by the board of directors of said road company, upon condition that said road shall be so located and constructed as to make the town of Carlisle a point in said road; otherwise these subscriptions shall be null and void." The appellant demurred to appellee's petition, which was overruled. The appellant answered, which was demurred to, and the demurrer sustained to the second and third paragraphs of the answer; an amended petition was filed which was demurred to, and the demurrer overruled, a trial had, and judgment for the appellee, from which the appellant prayed an appeal.

SIMPSON, J. (1) The obligors, among whom the appellant was one, agreed to pay to the Maysville & Lexington Railroad Company $50 on each share of stock, subscribed by them, upon condition that said road should be so located and constructed as to make the town of Carlisle a point, otherwise the subscriptions were to be null and void. Now this stock was to be paid only upon the condition that the road should be so located and constructed as to make the town of Carlisle a point. But when was it to be paid? The appellant contends that it was not to be paid until the road was finished, and that such is the meaning of the stipulation that the road should be so located and constructed as to make the town of Carlisle a point, otherwise the subscriptions were to be null and void.

The place and not the extent of the construction of the road was evidently referred to in this stipulation. The stock was to be paid, if the road was so constructed as to make the town of Carlisle a point, not when the construction of the road should be completed. But the writing itself fixes the time of payment. By it the subscribers agreed to pay the stock subscribed by them, in such installments, and at such times as might be required by the board of directors of said company. In giving construction to the instrument the whole of it must be considered. Now it is evident, looking to all the stipulations contained in it, that the entire construction of the road was not understood or intended by the parties to be a precedent condition to the payment of the stock. The construction, and

payment of the stock, were to be concurrent acts. No payment was to be made unless the road was so constructed as to make the town of Carlisle a point, but if it were constructed in that manner, the payment was to be made, at such time and place as the board of directors might designate.

(2) But if, instead of restricting ourselves to the letter of the instrument, to ascertain its true meaning, we take into consideration the object to be accomplished by the subscription, the nature and extent of the enterprise in which the parties were embarking, and the means by which it was to be effected, no difficulty can exist in determining the intention of the parties, or in giving such an exposition to the writing as will be consistent with it. The stock was subscribed for the very purpose of aiding in the construction of the road. To effect this object it must be paid as the work progresses. The postponement of its payment, until the work should be finished, is inconsistent with the very end to be accomplished by it. No road could ever be made on this principle, and therefore it cannot be supposed that these stockholders could have intended that the payment of the stock subscribed by them should not be made until the work had been completed. They desired to make the town of Carlisle a point in the road, and the payment of their stock was made to depend upon that condition. The road has been so located as to effect that object, and it is incumbent on them, according to any fair interpretation of their agreement, to pay the stock subscribed by them, to aid in its construction.

It is also contended, on the part of the appellant, that the agreement sued on is void, on the ground that the company had no authority under their charter to receive any but unconditional subscriptions of stock.

(3) By section 24 of the charter (Sess. Acts 1849–50, p. 302), the president and directors were authorized to sell or dispose of the unsubscribed stock for the benefit of the company. The only limit on this power was that the stock should not be disposed of under its par value. The right to make a conditional disposition of the stock seems to be unquestionable, under this provision in the charter. The substance of the agreement of the company, and the signers of the instrument of writing sued upon was, that if the former would locate the road so as to make the town of Carlisle a point, the latter would take the amount of stock subscribed by them. When the road was thus located, the signers became unconditional stockholders, and as such were entitled to all the corporate rights and privileges of members of the company. The stock itself was not conditional; it was only the agreement to take it that was conditional. The subscribers were not stockholders until the company had performed the condition upon which their undertaking depended, and

when that was done, they became stockholders by force of the agreement of the parties. The acquisition of stock in this manner was in our opinion sanctioned by the foregoing section of the charter, and does not seem to be prohibited by sound policy, or by any of the other provisions in the statute. Besides it has been usual under similar charters to make contracts of this kind, which fact, although insufficient of itself to give validity to such subscriptions of stock, may very properly be referred to for the purpose of showing the contemporaneous construction which has been given to charters containing similar provisions.

(4) The other matters of defense set up and relied upon in the answer are obviously untenable. The fact that the company have suspended operations upon the road, and that it will require a large additional expenditure of labor and money to complete its construction, and even the additional fact that the means of the company are wholly inadequate to the accomplishment of this object, do not furnish any sufficient reason why the defendant should not pay his stock. It may be, and probably is necessary, to aid in the payment of debts already incurred in the work previously done upon the road, or it may be required for the purpose of assisting in its further prosecution. The defendant could only be absolved from liability for the payment of his stock, by alleging and proving a final abandonment of the work by the company, and also that its payment was not necessary for the purpose of satisfying any existing demand against the corporation.

Wherefore the judgment is affirmed.

PITTSBURGH & S. R. CO. v. BIGGAR.

(Supreme Court of Pennsylvania, 1859. 34 Pa. 455.)

Error to the Common Pleas of Washington County.

This was an action of assumpsit by the Pittsburgh & Steubenville Railroad Company against Andrew Biggar, to recover nine unpaid instalments of $10 each, on ten shares of the stock of the company, subscribed for by the defendant, with interest thereon.

The following facts were stated and agreed upon by the parties, in the nature of a special verdict:

"The Pittsburgh & Steubenville Railroad Company was incorporated by an Act of Assembly, approved March 24, 1849, and letters patent were issued by the governor, dated July 22, 1851. Before the issuing of the letters patent, the defendant Andrew Biggar, resident in Washington county, subscribed ten shares to the capital stock of the company, in a book provided for that purpose by the commissioners named in the act of incorporation, which subscription is in the words and figures following:

"'We, the undersigned, agree to pay to the Treasurer of the Pittsburgh & Steubenville Railroad Company, the sums set opposite our respective names, to the stock of said company; provided, that no subscription shall be considered as due and valid, until the sum of $200,000 shall have been bona fide subscribed on the books of the company; provided, the road goes within half a mile of Florence.

"'Andrew Biggar, 10 shares.....$500.'

"The name of the said defendant, as a subscriber of ten shares, is contained in the report of the commissioners filed in the State Department, and also in the letters patent. More than $200,000 have been bona fide subscribed on the books of the said company to the stock thereof. The road of the said company was definitely located on the Harman's creek route, which is more than two miles from Florence, on the 24th day of May, 1852. * * *

"If the court should be of opinion, upon these facts, that the plaintiff is entitled to recover, then judgment to be entered against the defendant and in favor of the plaintiff, for the sum of $450, with interest at such rate, and from such dates, as the court may direct; otherwise, judgment to be entered for the defendant. Both parties reserve the right to sue out a writ of error."

The court below gave judgment for the defendant on the case stated; whereupon, the plaintiffs removed the cause to this court, and here assigned the same for error.[35]

STRONG, J.[36] * * * Conditional subscriptions are not contemplated. They would be a fraud upon the Commonwealth. It is the duty of the Commissioners to certify the name of every subscriber, with the number of shares subscribed by him, and on the faith of their certificate, the charter is granted. They are not required to certify the form or any conditions of subscription, for the law having declared what the contract shall be, excludes the possibility of conditions. If the commissioners may receive subscriptions clogged with terms unknown to the statute, then the securities which the law demands, as prerequisites to issuing the letters patent, may have no existence. Then the Commonwealth may be defrauded out of the franchise; for, instead of their being ten per cent. of the authorized capital pledged for the prosecution of the work, and for the fulfilment of the contract of the company with the state, no part of it may be available for any such purpose. The subscribers may obtain the charter without assuming any liability to invest a dollar. For unless the conditional subscription is a nullity, it must be certified; and if the commissioners may not receive conditional subscriptions, it is equally true, that no person can attach conditions to his subscription. The law offers him membership in the proposed company, on his absolute subscription and payment of $5 on each share.

[35] Statement of facts abridged. [36] A part of the opinion is omitted.

He must secure membership in that way, and on those terms, or not at all. If he may add a condition to his subscription, by which it becomes less than an absolute engagement to pay, he becomes a party to the fraud practiced upon the Commonwealth, for the commissioners are the agents of the subscribers, as well as of the state, to certify each subscription.

Besides, a stipulation for a particular route of the projected canal or railway is, in other respects, against the policy of the law, and therefore illegal. The law casts upon the board of directors who may be chosen after the organization of the company, the selection of the route. In the choice of this board, each subscriber is to have a voice proportionate to the amount of his stock. The state is interested, as well as the stockholders in the corporation, in having this board exercise an unbiased judgment. But a stipulation in a subscription, in favour of a particular route, if it have any efficacy, tends to deprive the state and the stockholders of the benefits of such untrammeled selection, and it is conceivable, that it might entirely destroy the public utility of the enterprise.

If it be urged, that the construction of the road over a designated route, may be regarded as a part of the consideration for the promise to pay the subscription, it does not alter the case; such a stipulation is none the less illegal. But this is an erroneous view of the matter. The law offers to the subscriber membership and stock, as the consideration for his subscription, and it offers no more. If he could secure more, it would be a wrong to the other subscribers, not less than if the stipulation were, that he should have a certificate for two shares of stock, on payment for one. The rights of all subscribers are necessarily equal; nor can there be any such thing as conditional membership; either the defendant in error became a corporator on the issuing of the letters patent, by virtue of his subscription, and the payment of five dollars for each share, or the subscription amounted to nothing. If the contract was binding, he was entitled to vote for directors, and was entitled to the stock, as he certainly would have been, it is admitted, if the road had been built within half a mile of Florence. But suppose that, including the subscription of the defendant, the whole authorized capital had been taken. Will it be contended, that more might have been received, and the defendant's subscription displaced? If it might, then no certificate could have been issued to him; then he would be, at the same time, a member, and not a member. If it might not, then it would be only because the membership of the company was full, because the defendant's subscription made him a member; and if he was a member, certainly a failure to adopt the route stipulated for would not divest his membership. It would not authorize the company to forfeit his stock, and while a stockholder, he continued a member.

Was then the subscription a nullity? Certainly, it was operative for some purposes. It enabled the commissioners to receive and to retain the five dollars paid upon each share subscribed, and it aided in obtaining the letters patent. On the faith of it, the Commonwealth parted with franchise conferred upon the company. If such subscriptions, with such conditions, are invalid, then the whole capital of a company might be withheld, even after charter granted, and the objects of the grant thus be entirely defeated. It is not for the defendant to say, that his subscription is a nullity; that he has assumed no liability, when his act induced the grant of the charter, and fastened upon his co-corporators the obligation to pay the amount of their subscriptions. It is the condition of the subscription, which is the illegal part; it is that which is repugnant to the nature of a subscription, and which is in conflict with the policy of the law, and therefore the defendant cannot assert it.

At most, also, the stipulation in the contract of subscription was a condition subsequent; certainly, subsequent to membership in the company, and subsequent also to the liability to pay. The thing provided for could only be determined, after the organization of the company. The words of the condition show this. The defendant promised to pay, "provided the road goes within half a mile of Florence." But payment of the subscriptions was necessary to enable the road to go anywhere; no other means was provided for either the location or construction of the road; payment was, therefore, necessarily antecedent to a compliance with the condition. But if it was a condition subsequent, and illegal, as we have endeavoured to show, then it is void, and the subscription is in law absolute. * * *

The authorities, therefore, appear to establish that the defendant became an actual subscriber for the stock of the company, and not a mere contractor to subscribe on the subsequent performance of a condition. His engagement was in law absolute, and not rendered contingent, by his express recital of the motive which persuaded him to subscribe. This grows out of the nature of the contract.

When a subscription is received, after the organization of a company, different principles apply. There, a party is in existence with whom the subscriber can stipulate, and then his conditional promise can work no fraud upon the Commonwealth, or his co-subscribers. This distinction is clearly taken in many of our cases.

The judgment of the Court of Common Pleas is reversed, and judgment is ordered to be entered for the plaintiffs for $450, with interest, at the rate of 12 per cent., from the time the calls became payable, to wit, in all, $825.24.

MINNEAPOLIS THRESHING MACHINE CO. v. DAVIS.

(Supreme Court of Minnesota, 1889. 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701.)

MITCHELL, J.[87] This was an action to recover installments due on subscriptions to stock of the plaintiff. The facts fully appear from the findings of the court in connection with Exhibits A and B attached to the complaint. Those material for present purposes are that, a scheme having been started to organize a manufacturing corporation with $250,000 capital, whose works should be located at Junction City, near Minneapolis, and one McDonald having proposed that if the citizens of Minneapolis would subscribe $190,000 to the capital stock he would subscribe the remaining $60,000, one Janney, a promoter, but not a subscriber to the stock of the proposed corporation, acting as a voluntary solicitor, having with him the subscription paper, (Exhibits A and B) about April 1, 1887, proceeded to canvass for subscriptions to the stock of the proposed corporation on the terms and conditions embodied in the paper. He first applied to defendant, who subscribed $5,000 of stock. Afterwards, and about the same date, other citizens respectively subscribed to the stock, on the same paper, to the aggregate amount, including defendant's subscription, of $190,000, of which over $65,000 has been paid into plaintiff. Thereupon McDonald, in accordance with his proposition, subscribed the remaining $60,000, which he has paid up in full. All the conditions expressed in the written subscription (Exhibit A) having been fully performed and complied with, the proposed corporation was afterwards, about April 25, 1887, organized, and these subscriptions to its stock delivered over to it. The corporation, acting in good faith upon such subscriptions, including that of defendant, expended large sums of money in locating and constructing its works, and entered into large contracts, and incurred liabilities to the amount of over $75,000. During all this time, the corporation had no notice or knowledge of any condition being attached to defendant's subscription other than those expressed in the subscription paper itself. Neither is it found or claimed that any of the other subscribers to the stock had any such notice or knowledge. Defendant was not present at the organization of the corporation, and never attended or took part in any of its meetings, and had no notice or knowledge that the subscription paper had been transferred or delivered over to the plaintiff, or that plaintiff relied on it, until about November, 1887, just prior to the commencement of this action.

Upon the trial the defendant was permitted, against plaintiff's objection and exception, to testify that he signed or subscribed to the stock only upon the express oral condition and agreement then had

[87] Statement of facts omitted.

between him and Janney that the latter should retain in his possession said agreement with his name signed thereto, and not deliver it to any one, or use it in any way, until certain four persons should subscribe to the stock, each in the sum of $5,000; that Janney took the agreement from defendant on that express condition and understanding, and not otherwise; that none of these four persons ever did subscribe to the stock of the plaintiff; and that defendant never authorized Janney or any one to deliver said agreement to any one except upon the condition referred to. The court found the facts to be in accordance with the testimony, and upon that ground found as a conclusion of law that defendant never became a subscriber to the plaintiff's stock. The competency of this evidence is the sole question in this case.

Under the elementary rule of evidence that a written agreement cannot be varied or added to by parol, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing to be effectual. This rule applies with special force to a case like the present, where to allow the defendant now to set up a secret parol arrangement by which he may be released, while his fellow-subscribers continue to be bound, would be a fraud, not only upon them, but upon the corporation which has been organized on the faith of these subscriptions and upon its creditors. The defendant of course does not attempt to controvert so elementary a rule as the one suggested, but contends that the effect of this evidence was not to vary or contradict the terms of the writing, but to prove that there was never any delivery of it, and hence that there never was any contract at all, delivery being prerequisite to the very existence of a contract. His claim is that the subscription paper was given to and received by Janney merely as an escrow, or as in the nature of an escrow, only to be delivered or used upon the performance of certain conditions precedent, and that until they were performed there could be no valid delivery.

In determining this question it becomes important to consider the nature of a subscription to the stock of a proposed corporation, and the relation of the different parties to each other, under the facts of this case. A subscription by a number of persons to the stock of a corporation to be thereafter formed by them has in law a double character: First. It is a contract between the subscribers themselves to become stockholders without further act on their part immediately upon the formation of the corporation. As such a contract it is binding and irrevocable from the date of the subscription, (at least in the absence of fraud or mistake,) unless canceled by consent of all the subscribers before acceptance by the corporation. Second. It is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, be-

comes as to each subscriber a contract between him and the corporation. 1 Mor. Priv. Corp. § 47 et seq.; Hotel Co. v. Friederick, 26 Minn. 112, 1 N. W. 827.

Janney, the promoter who solicited and obtained the subscriptions, occupied the position of agent for the subscribers as a body, to hold the subscriptions until the corporation was formed in accordance with the terms and conditions expressed in the agreement, and then turn it over to the company without any further act of delivery on part of the subscribers. The corporation would then become the party to enforce the rights of the whole body of subscribers. It follows, then, that, considering the subscription as a contract between the subscribers, a delivery to Janney by a subscriber was a complete and valid delivery, so that his subscription became eo instanti a binding contract. The case stands precisely as a case where a contract is delivered by the obligor to the obligee. It cannot therefore be treated as a case where a writing has been delivered to a third party in escrow.

The defendant, however, attempts to bring the case within the rule of Westman v. Krumweide, 30 Minn. 313, 15 N. W. 255, in which this court held that parol evidence was admissible to show that a note delivered by the maker to the payee was not intended to be operative as a contract from its delivery, but only upon the happening of some contingency, though not expressed by its terms; that is, that the delivery was only in the nature of an escrow. We so held upon what seemed the great weight of authority, although the doctrine, even to the extent it was applied in that case, is a somewhat dangerous one. The distinction between proving by parol that the delivery of a contract was conditional, and that the contract itself contained a condition not expressed in the writing, is one founded more on refinement of logic than upon sound practical grounds. It endangers the salutary rule that written contracts shall not be varied by parol. Said Erle, J., in Pym v. Campbell, 6 El. & Bl. 370, in sustaining such a defense: "I grant the risk that such a defense may be set up without ground, and I agree that a jury should therefore look on such a defense with suspicion." And in all the cases where such a defense has been sustained, so far as we can discover, they have been cases strictly between the original parties, and where no one has changed his situation in reliance upon the contract and in ignorance of the secret oral condition attached to the delivery, and hence no question of equitable estoppel arose. Many of the cases have been careful to expressly limit the rule to such cases. Benton v. Martin, 52 N. Y. 570; Sweet v. Stevens, 7 R. I. 375.

Conceding the rule of Westman v. Krumweide, supra, to its full extent, there are certain well recognized doctrines of the law of equitable estoppel which render it inapplicable to the facts of the present case. This subscription agreement was not intended to be the

sole contract of defendant. It was designed to be also signed by other parties, and from its very nature defendant must have known this. Each succeeding subscriber executed it more or less upon the faith of the subscriptions of others preceding his. The paper purports on its face to be a completed contract, containing all the terms and conditions which the subscribers intended it should. When this agreement was presented to others for subscription defendant had not only signed it in this form, but he had also done what, under the facts, constituted, to all outward appearances at least, a complete and valid delivery. He had placed it in the proper channel, according to the ordinary and usual course of procedure for passing it over to the corporation when organized, and clothed Janney with all the indicia of authority to hold and use it for that purpose without any other or further act on his part, untrammeled by any condition other than those expressed in the writing. In reliance upon this, others have not only subscribed to the stock, but have since paid in a large share of it. The corporation has been organized and engaged in business, expending large sums of money, and contracting large liabilities, all upon the strength of these subscriptions to its stock, and in entire ignorance of this secret oral condition which defendant now claims to have attached to the delivery. To permit defendant to relieve himself from liability on any such ground under this state of facts, would be a fraud on others who have subscribed and paid for stock, upon the corporation, which has been organized and incurred liabilities in reliance upon the subscriptions, and on creditors who have trusted it. The familiar principle of equitable estoppel by conduct applies, viz.: Where a person, by his words or conduct, willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other.

M. B.

We have examined all of the numerous cases cited by defendant's counsel, and fail to find one which, in our judgment, is analogous in its facts, or the law of which will cover the present case. The two which at first sight might seem most strongly in his favor are Railroad Co. v. Palmer, 19 Wis. 574, and Railroad v. Hall, 1 Ill. App. 612. But an examination of those cases will show that in neither did or could any question of estoppel arise, and in both the court held that the person to whom the instrument was delivered after signature was a stranger to it, so that it was strictly a delivery in escrow to a third party. Cases are cited where a surety signed a bond or non-negotiable note, and delivered it to the principal obligor upon condition that it should not be delivered to the obligee until some other person signed it, and where, without such signature, the principal obligor delivered it to the obligee, and yet the courts held that the surety was not liable, although the obligee had no notice of

the condition. Such cases seem usually to proceed upon the theory that a delivery to the principal obligor under such circumstances is a mere delivery in escrow to a stranger; the term "stranger," in the law of escrows, being used in opposition merely to the party to whom the contract runs. It may well be doubted whether in such cases where the instrument is complete on its face the courts have not sometimes ignored the law of equitable estoppel. No such defense would be allowed in the case of negotiable paper, and it is not clear why the distinction should be drawn on that line. The doctrine of estoppel rests upon totally different grounds, and operates independently of negotiability, being founded upon principles of equity. But whether the cases referred to be right or wrong, we do not see that they are in point here.

Our conclusion is that the court erred in admitting the evidence objected to, and for that reason a new trial must be awarded. Order reversed.[88]

COOK, Assignee, v. CHITTENDEN.

(Circuit Court, E. D. Michigan, 1885. 25 Fed. 544.)

On Motion for New Trial.

This was an action by the assignee of the State Insurance Company, of Chicago, to recover an assessment upon its capital stock. The declaration averred in substance that the by-laws of the company provided that the capital stock should be divided into shares of $100 each, 20 per cent. of which was required to be paid in cash at the time of subscription and delivery of the certificate of stock, and that no further assessment should be made unless the original paid-up capital should become impaired by losses; that on the twelfth of July, 1870, the defendant subscribed for 50 shares of the stock, paid the assessment, and received the certificate; that in consequence of the losses sustained by the Chicago fire in 1871 the company was declared bankrupt, and plaintiff subsequently became its assignee; that in July, 1882, an assessment of $25 a share was made, by an order of the district court of Northern Illinois, for which this suit was brought. The plea was that defendant never became a stockholder, and therefore was not liable for the assessment. A verdict was directed for the defendant. The facts are stated in the opinion of the court.

BROWN, J. The only evidence offered by the plaintiff tending to show the subscription was the stock-book of the company, in which the name of the defendant appeared in the handwriting of the secretary as the owner of 50 shares. This book was admitted upon the authority of Turnbull v. Payson, 95 U. S. 421, 24 L. Ed. 437, in

[88] Compare: Gilman v. Goss, 97 Wis. 224, 72 N. W. 885 (1897).

which it was held that where the name of an individual appeared on the stock-book of a corporation as a stockholder the presumption was that he was the owner of the stock, and in an action against him as a stockholder the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant. This was criticised as a mere dictum, but the point was directly involved in the case, and we think the decision is controlling.

Defendant then proved by his own testimony, and that of another witness who was employed in aiding the agent of the company to procure subscriptions to the stock, that he agreed to take 50 shares of the stock, provided he should be allowed to withdraw his subscription at any time before the agent of the company left the city. He did not know whether the condition was embodied in the subscription or not. Before the agent left the city he notified him of his wish to withdraw, to which the agent assented. The book containing the subscriptions was subsequently destroyed. The 20 per cent. was never demanded nor paid, nor was any certificate made out or delivered to him. How his name appeared upon the stock-book was not explained. At this time the company was already organized, and was free from debt, except its contingent liability upon policies already issued. The question, then, is not whether the defendant had the power to withdraw, after having made a valid and binding subscription, but whether his contract to take the shares ever took effect at all, or he ever became a stockholder. There are numerous cases in the supreme court which hold that if an individual actually subscribes for and agrees to take stock in a corporation, he will not be permitted, as against creditors, to set up fraudulent representations of the agent that he would only be responsible for a certain percentage of the subscription, even though he receives a certificate with the words "non-assessable" written across the face. Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203.

There is no doubt that one who receives a certificate of stock for a certain number of shares at a stated sum per share, thereby becomes liable to pay the amount thereof when called upon by the corporation or creditors; and in Hawley v. Upton, 102 U. S. 314, 26 L. Ed. 179, the court went still further, and held that such obligation attached to a party who had agreed simply to pay one-fifth of the par value of 10 shares received by him, though no certificate was ever issued. There is no intimation, however, in any of these cases that an actual subscription and intent to take stock is not necessary to create the relation of stockholder. A by-law of this company provided and required that 20 per cent. of the capital stock should be paid in cash at the time of the subscription and delivery of the certificate. Whether the payment of this installment was a condition precedent to the valid organization of the company, or to the further liability of the stockholder, may admit of some doubt. There

are a large number of cases upon the question, most of which turn upon the language of the charter. But conceding that if the certificate were tendered and refused an action would lie against the defendant for the installment, it does not follow that the subscription could not be canceled by mutual consent. It was evidently contemplated by the by-laws that the subscription, the delivery of the certificate, and the payment of the 20 per cent. should be practically contemporaneous acts, and there is no doubt in my mind that the agent who acted for the corporation in receiving the money of a subscriber had also authority to release him before the subscription was perfected; in other words, that if the subscription was not void by reason of the non-payment of 20 per cent. and the non-delivery of the certificate, it was at least voidable by the mutual assent of both parties. There were no creditors then in existence to be defrauded. The name of the defendant had not then been put upon the books of the company as a stockholder. He had never acted or held himself out as a stockholder by voting for directors or attending meetings.

But even if the agent had no authority either to receive a conditional subscription, or to release the defendant from his obligation to take the stock, the failure of the company for the 17 months which elapsed before its bankruptcy to insist upon the defendant receiving the certificate and paying his installment was a ratification of the agent's acts, and conclusive evidence that he never was looked upon as a stockholder. The only case to which my attention has been called which is supposed to conflict with this view is that of White Mountains R. Co. v. Eastman, 34 N. H. 124. In this case defendant's intestate agreed to take 30 shares of the capital stock of a railroad. Before his death 13 assessments were ordered by the directors, of which due notice was given the intestate, and it appeared that he acted as one of the directors during the time of making the assessment, and was present at a meeting of the board when 10 of the 13 were ordered. In defense, a paper was introduced, signed by a clerk of the corporation, and contemporaneous with the subscription, in which, in consideration of his taking the 30 shares, the corporation agreed to release him from 25 of said shares, or such portion thereof as he might within one year elect to withdraw from his subscription; and if he had been assessed and paid anything on those shares that he elected to be released from, such payments should be allowed him on the shares that he should retain in said corporation. It was further shown that the subscriptions of the directors were so taken in order to show as large a subscription as possible at a hearing before the railroad commissioners upon the question of the location of the road between this and another railroad corporation, and also to induce other persons to subscribe. It also appeared that the board extended the time year after year for the

election to be made by the directors whether they would or not diminish the number of shares for which they would be accountable, and it was admitted that the defendant, as administrator of Eastman, gave notice to the corporation of his election not to take 25 of the 30 shares subscribed by him.

The court held that if no person was to be affected by the contract but the parties themselves, it would be competent for them to make an agreement for the reduction in the shares, and that the two writings might be considered both as parts of the same agreement, but that they should be regarded as separate and independent contracts whenever it was necessary to so regard them to protect innocent third parties against the fraud attempted to be practiced upon them by means of it. The court held the agreement for a reduction of the shares to be void, and in delivering the opinion observed: "The fraud in this case consists not in the fact the parties agreed that the intestate should have the right to repudiate his subscription to a certain extent, but in suppressing that material feature in the agreement, and in holding out to others as their contract one which speaks in very different terms from that which, in fact, they made. If the conditional character of the subscription had appeared upon the subscription book itself, by inserting the provision that the intestate was at liberty thus to reduce his subscription, no person could have been deceived, and the contract would undoubtedly have been valid. The parties, for the purposes of deception, severed and disconnected the conditional stipulation from the contract, so as to render it on its face an absolute engagement by the intestate to pay for the thirty shares, and in this form held it out to others as their true contract."

The case under consideration obviously differs from this in the facts that the defendant never perfected his subscription by taking his certificate and paying his first installment, and never acted or held himself out as a stockholder, and there was not the slightest evidence of an intent on his part to defraud, or anything to warrant the belief that defendant's name was ever used as an inducement to other persons to subscribe.

The case of Melvin v. Lamar Ins. Co., 80 Ill. 446, is equally wanting in analogy. In this case the defendants took 5,500 shares of stock in an insurance company, paid 20 per cent. down in cash, and received certificates. The agreement under which they took the stock provided that they might, at their option, surrender it, when the certificates would be canceled and the money repaid. Subsequently all this stock was surrendered and canceled. Meantime, however, defendants were held out as large stockholders. This enabled the company to obtain the proper certificate from the state auditor's office and to procure other subscribers to a large amount. The transaction was held to be a fraud partly upon the authority of the New

Hampshire case, which it much resembles, but for the same reasons is not controlling here.

The case, then, is substantially this: The defendant agreed to take 50 shares of stock, with the understanding that he might withdraw within a certain time if he chose. He elected to withdraw within this time, and notified the agent of the company, who assented to such withdrawal, and released him. The directors of the company made no effort during the life of the company to collect the installment that should have been paid, or to tender him a certificate. Twelve years thereafter, and long after the statute of limitations had run against any action to recover the original assessment, he is sought to be charged as a stockholder. The attempt to hold him as such is so manifestly unjust that we feel no difficulty as to the proper disposition of the case. The motion for a new trial will therefore be denied.

GRESS et al. v. KNIGHT et al. (six cases).

(Supreme Court of Georgia, 1910. 135 Ga. 60, 68 S. E. 834, 31 L. R. A. [N. S.] 900.)

Proceedings for the appointment of receivers for the Bank of Waycross. A. M. Knight and others were appointed receivers, and M. C. Gress and others intervene, praying for a rescission of their subscription to the stock of the bank. Demurrers to the interventions were sustained, and interveners bring error.

The rescission is sought on the ground of the false and fraudulent character of the representations made by the bank and its agents to the interveners to induce the taking of the stock. Some had paid for the stock, some had given notes therefor. The prayers were for a rescission and other equitable relief. General and special demurrers were filed. They were sustained and the interventions dismissed; and the interveners each excepted.[39]

LUMPKIN J.[40] 1. In England it is settled that after the commencement of winding up proceedings against a corporation an application to be relieved from liability as a shareholder on the ground of fraud practiced upon him by agents of the company in procuring the subscription comes too late. Oakes v. Turquand, L. R. 2 H. L. 325; Stone v. City & County Bank, 3 C. P. Div. 282. By the companies act of 1862 (Statutes at Large; 25 & 26 Vict. 434, §§ 23, 26, 37, 38) every company was required to keep a register of members or sharesholders, showing the name and address of each, and the date of becoming a member and ceasing to be a member, and a penalty was provided for a failure so to do. Once a year a list was required to be made up and forwarded to the public registrar. The

[39] Statement of facts abridged. [40] A part of the opinion is omitted.

register of members was made prima facie evidence of what it was required to contain. On winding up every present and past member who had not ceased to be a member for a year was liable to contribute to the payment of debts. How far the English decisions may have been affected by the requirements of that act need not be considered.

In this state there is no similar law. The courts must determine the question by applying general principles of equity. A stockholder occupies a threefold relation: First, to the corporation itself; second, to other stockholders; and, third, to creditors of the corporation. Fraud does not render a contract absolutely void, but voidable. It remains valid until repudiated or avoided. As between a stockholder and the corporation, unless special circumstances alter the case, the general rule that contracts obtained by fraud may be avoided by the party defrauded applies to a stock subscription induced by the fraud of the company through its authorized agents. So also where only the rights of other shareholders are affected; the company being solvent and "a going concern." These matters are of comparatively easy solution. But, where the rights of creditors are involved, the question is one of greater difficulty.

Some American decisions have announced in general terms the rule laid down by the English courts; but in most of them additional circumstances existed, such as receiving benefits after knowledge or notice of the fraud, acts done, after notice or knowledge, inconsistent with a disaffirmance, laches, estoppel, the intervening of rights of innocent third parties, or the like. Thus in Chubb v. Upton, 95 U. S. 665, 667 (24 L. Ed. 523), Mr. Justice Hunt said: "It has been several times adjudged in this court that in an action by such assignee to recover unpaid subscriptions upon stock in such an organization the defense of false and fraudulent representations inducing such subscription cannot be set up, especially when the subscriber has not been vigilant in discovering such fraud, and in repudiating his contract."

It cannot be easily determined just how far a rule laid down in general terms would be applied in the absence of the facts added to it under an "especially." In the case just cited Chubb was sued by an assignee in bankruptcy of the company. He sought to set up irregularities and informalities in the increase of capital stock to which he became a subscriber, and also fraud in the procurement of his subscription. It appeared that he was president of a branch of the company, took part in its meetings, paid money on his stock, and at one time gave a proxy to another person to attend and vote at a stockholders' meeting at the main office. He made no effort to cancel his subscription. The company incurred liabilities, and was adjudicated a bankrupt about 15 months after his subscription Clearly he should not have been relieved.

In Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203, the shareholder had delayed repudiating his subscription for three years and until an assignee in bankruptcy had been appointed, and there were other circumstances showing laches. Discussions of the subject will be found in 2 Thompson on Corporations, §§ 1440, 1449; Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800; Farrar v. Walker, 3 Dill. 506, Fed. Cas. No. 4,679; Newton National Bank v. Newbegin, 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727, and note; Parker v. Thomas (Ind.) 81 Am. Dec. 385, 401, note. A number of American decisions are to the effect that where one subscribes to stock and the company proceeds to do business, incurs liabilities and later fails and is adjudged a bankrupt, or its assets are placed in the hands of a receiver for the purpose of winding it up, no rescission will be allowed, unless under exceptional circumstances. Thompson, Corporations, § 1450. * * *

When a person becomes a stockholder of a corporation, he becomes a part of it. Its agents are in a sense his agents. They go out and deal with the public. If through their dealings debts are incurred, assuming both the stockholder and the creditor to be innocent and that one must suffer, the former, who put it in the power of the agents to do the wrong, should suffer rather than third parties who dealt with such agents. Civ. Code 1895, § 3940. As to creditors whose claims arose after the stockholders became such, their rights are superior to any right of rescission. The status of a stockholder relative to creditors who became such after he took the stock is not in all respects identical with that relative to antecedent creditors. As to creditors whose debts were created before he took the stock, questions of laches, acts inconsistent with rescission, estoppel, etc., might arise. The new stockholder may have permitted the increase of indebtedness and the lessening of the assets with which to pay.

It does not affirmatively appear in this case whether debts were created after the interveners became stockholders, or their amount. There was originally an allegation in each intervention on information and belief that all the creditors were the same as those existing before the new stock was issued; but this was stricken by amendment. We do not think that it can be said as matter of law that such laches or conduct on the part of the interveners affirmatively appears on the face of the respective interventions as to authorize us to declare that no rescission could be had, whatever may be developed by the evidence. It was error to sustain the general demurrers. If the interventions were not otherwise demurrable, they did not become so by reason of failing to negative the existence of any debts incurred after they took their stock. That was matter of defense to the intervention under the facts alleged.

Most of the special demurrers were not meritorious. These were not original suits, but interventions in the main suit, where the assets, books, and memoranda were in the hands of the receivers. The special demurrers, if they were all sustained, would have required the attaching to each intervention of a large part of the items from such books, in order to show insolvency, or that the representations that there were no overdrafts and that there was a large surplus, etc., were false. We do not think this was necessary. When the facts are shown, it can be made to appear whether a fraud was really perpetrated on each of the interveners, whether there was any lack of diligence in discovering such fraud or unreasonable delay in seeking relief after its discovery, whether there was any active participation by the interveners in the management of the corporation, or whether debts had been incurred after the intervener became a stockholder, which either gave corporate creditors superior equitable rights or estopped the intervener from denying that he was a stockholder, and generally whether his conduct was such as to prevent relief. * * *

Judgment in each case reversed, with direction. All the Justices concur, except BECK, J., absent.[41]

REID v. OWENSBORO SAVINGS BANK & TRUST CO. et al. ROBERTS v. SAME.

(Court of Appeals of Kentucky, 1911. 141 Ky. 444, 132 S. W. 1026.)

Appeals from Circuit Court, Daviess County.

Actions by the Owensboro Savings Bank & Trust Company and another against Allen Reid and against M. L. Roberts to recover dividends paid when the corporation was insolvent. Defense that the defendants were induced to take the stock by false representations as to the condition of the bank and value of the stock made by officers of the bank, and praying that the stock be canceled. From a judgment for plaintiffs in each action, defendant in each action appeals.[42]

CARROLL, J.[43] * * * Defendants averred that at the time they purchased the stock the bank was in fact insolvent, and that its condition was unknown to them. They each tendered to the receiver the shares of stock issued to them, and asked that the contract be rescinded and that they have judgment for the amount paid for the stock, less the dividends paid to them, or that the amount paid by

[41] Compare: Marion Trust Co. v. Blish, 170 Ind. 686, 84 N. E. 814, 85 N. E. 344, 18 L. R. A. (N. S.) 347 (1908).

[42] Statement of facts substituted. [43] A part of the opinion is omitted.

them, less the dividends, be treated as a claim against the bank. As the real purpose of this defense was to obtain a rescission of the contract upon the ground of fraud, we will so treat it, and not further allude to the doctrine of equitable set-off presented in argument. General demurrers filed to these answers were sustained by the lower court, upon the ground that the answers did not present a defense to the action, and, declining to plead further, judgment was rendered against the appellants for the dividends respectively received by them.

We will take up and determine first the question of the right of the appellants to have a cancellation of the stock, and a judgment for the return of the money paid by them, less the dividends received. In disposing of this question it may be conceded that when the stock was purchased the bank was insolvent, and that neither of the appellants knew this fact, and further conceded that they were induced to and did purchase the stock by reason of the false and fraudulent representations as to the value of the stock made to them by the president and officers of the bank, and that they in good faith believed at the time of their purchase that the bank was a solvent and prosperous institution and its stock reasonably worth the amount paid for it, which was largely in excess of its par value.

Assuming this much as true, it may further be admitted that if the bank had not gone into insolvency, or the rights of depositors and creditors would not be prejudicially affected, these stockholders would have the right to a cancellation of their shares and a return of the money paid for them, as it is well settled that, when a purchaser of shares of stock in a bank or other corporation is induced to make the purchase by reason of the false and fraudulent representations of the officers and directors of the corporation that the concern is solvent and the shares worth the amount at which they are offered to be sold, the purchaser may, upon the discovery of the fraud, if action is brought within seasonable time and during the solvency of the corporation, have a cancellation of the stock and a return of his money. Upon this point there is practical agreement among the authorities, as may be seen by an examination of Fear v. Bartlett, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721, and note; Chamberlain v. Trogden, 148 N. C. 139, 61 S. E. 628, 16 Ann. Cas. 177, and note; Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Coles v. Kennedy, 81 Iowa, 360, 46 N. W. 1088, 25 Am. St. Rep. 503; Virginia Land Co. v. Haupt, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939; Zang v. Adams, 23 Colo. 408, 48 Pac. 509, 58 Am. St. Rep. 249; Kentucky Mutual Investment Co. v. Schaefer, 120 Ky. 227, 85 S. W. 1098, 27 Ky. Law Rep. 657; Prewitt v. Trimble, 92 Ky. 176, 17 S. W. 356, 36 Am. St. Rep. 586; Cook on Stockholders, §§ 151–165; Clarke and Marshall on Private Corporations, §§ 1478–1487.

But the question here presented is: Has a stockholder the right to this relief after the corporation has become insolvent, and proceedings have been instituted to wind up its affairs, and when to grant the relief would prejudice the rights of its creditors? Upon this question there is considerable diversity of opinion in the cases that have considered it. In some jurisdictions the right of a shareholder, when a fraud in the sale of stock has been practiced upon him by the corporation, to have a rescission of his contract, is not allowed after the corporation has become insolvent and proceedings have been taken to liquidate its affairs, although the fraud was not discovered before insolvency and there was no laches in failing to discover it. 2 Thompson on Corporations, §§ 1360–1378; Cook on Stockholders, §§ 151, 154; Hinkley v. Oil & Pipe Line Co., 132 Iowa, 396, 107 N. W. 629, 119 Am. St. Rep. 564; note to Fear v. Bartlett, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721. But a number of courts of last resort, including our own, hold that if the shareholder has been vigilant in discovering the fraud, and has not been guilty of any laches, he may rescind the contract after the corporation has become insolvent, and proceedings have been instituted to wind up its affairs. Newton National Bank v. Newbegin, 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727; 10 Cyc. 440. * * *

In brief, our conclusion is that, when a stockholder has been induced by the false or fraudulent representations of the officers of a corporation to purchase its stock, he may, during the solvency of the corporation, if the action is brought within a reasonable time after the fraud is discovered and before the statute of limitation has barred it, have a rescission of his contract upon equitable terms or recover the loss sustained by the fraud. But if the corporation is insolvent when the action for rescission or other relief is brought, or if proceedings have then been instituted to liquidate its affairs on the ground of insolvency, and the rights of creditors will be affected, the shareholder who has been induced by fraud or misrepresentation to purchase stock cannot obtain relief from his contract, unless he became a stockholder so shortly before the insolvency as not to have had reasonable time or opportunity to investigate its affairs and discover the fraud, nor unless upon the discovery he without delay asserts his right to appropriate relief. Having this view of the question, we think the lower court properly refused to permit the shareholders to rescind their contracts. Scott v. Deweese, 181 U. S. 203, 21 Sup. Ct. 585, 45 L. Ed. 822; Scott v. Abbott, 160 Fed. 573, 87 C. C. A. 475; Wallace v. Bacon (C. C.) 86 Fed. 553; Wallace v. Hood (C. C.) 89 Fed. 11

The remaining question is the right of Reid to set off against the action to recover dividends the deposit in the bank at the time it went into the hands of a receiver. Keeping in mind the settled doctrine in this state that the assignee or receiver of an insolvent cor-

poration does not occupy any better position than his assignor, as held in Kentucky National Bank v. Louisville Bagging Co., 98 Ky. 371, 33 S. W. 101, 17 Ky. Law Rep. 983, Exchange & Deposit Bank v. Stone, 80 Ky. 109, Bridgford v. Barbour, 80 Ky. 529, and Kentucky Mutual Investment Co. v. Schaefer, 120 Ky. 227, 85 S. W. 1098, 27 Ky. Law Rep. 657, there is not much difficulty in reaching the conclusion that the receiver could not recover from Reid $600, when the institution of which he became receiver at the time it was placed in his hands owed Reid $2,000. If the action had been brought by the bank before it became insolvent to recover from Reid these dividends, there could be no doubt that Reid could set off against the claim the money on deposit by him in the bank, and his rights in this particular are the same when the action is brought by the receiver. Finnell v. Nesbit, 16 B. Mon. 351; Ely v. Horine, 5 Dana, 398; Harlan v. Lumsden, 1 Duv. 86.

Wherefore the judgment in the case of M. L. Roberts against the appellee bank and trust company is affirmed, and the case of Allen Reid against the appellee bank and trust company is reversed, with directions for proceedings in conformity with this opinion.

SECTION 4.—PROMOTERS

I. The Promoter as a Fiduciary

PITTSBURG MIN. CO v. SPOONER et al.

(Supreme Court of Wisconsin, 1889. 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149.)

A complaint alleged, in substance, that defendants, having obtained the right to purchase a certain mining option for $20,000, proceeded to form a corporation to make such purchase, representing to the persons who subscribed for stock that the option would cost $90,000; and that, having first induced third persons to subscribe for the stock upon such representations, and to pay to the corporation the sum of $100,000 for their stock, the corporation then, through defendants, its officers, purchased the option nominally for $90,000, paying the $20,000 which it actually cost them with the money received by the corporation from the sale of stock, and converting the remaining $70,000 to their own use. The action was brought in the name of the corporation, to recover the $70,000.[44]

[44] Statement of facts substituted.

TAYLOR, J.[48] * * * (11) It is further alleged in the complaint that the amount paid to the owners of said option by the defendants in behalf of the plaintiff was the sum of $20,000; that the amount was obtained by the defendants from the corporation on the fraudulent pretext that such payment was $90,000, $70,000 of which the defendants have diverted from the company, and fraudulently appropriated to their own use, and for this amount they are jointly indebted to the plaintiff as for so much money had and received to its use, and the plaintiff demands judgment for the said sum of $70,000, with interest and costs.

To this complaint the defendants demurred, and allege as grounds of demurrer: (1) That the plaintiff has not legal capacity to sue; (2) that the complaint does not state facts sufficient to constitute a cause of action. Upon the argument of the demurrer in the circuit court, the court sustained the demurrer, and from the order sustaining the demurrer, the plaintiff appealed to this court.

Upon the hearing of the appeal in this court, no contention was made by the learned counsel for the respondents that the demurrer was properly sustained upon the first alleged ground, viz., that "the plaintiff has not legal capacity to sue." The only question argued at length was whether the complaint stated facts sufficient to constitute a cause of action. The learned counsel for the appellant corporation contends that the complaint states facts constituting a cause of action—First, upon the ground of actual fraud committed by the defendants upon the company by the sale of the mining option to the company for a sum greatly in excess of its real value, brought about by false representations as to its actual cost; and, second, that it states a cause of action against the defendants as the promoters of the corporation, and, as such, holding a relation of trust and confidence towards it; and that, acting as the agents and officers of the corporation, they sold to the corporation, and bought for the corporation, the mining option for the sum of $70,000 more than its actual value and more than they paid for the same; that this was done without the knowledge and consent of the real stockholders of the corporation, and in fraud of their rights, and upon that ground they are liable to the corporation for the profits made by them on such sale to the corporation. The last alleged cause of action is the one upon which the learned counsel for the appellant mainly relies in this court, and is the one in favor of which the main argument of the learned counsel for the appellant is made.

Considering the defendants as the officers and promoters of the corporation at the time of the alleged purchase and sale complained of, it seems to me very clear that—laying out of view the fact that the money of the stockholders paid for their stock to the corpora-

[48] A part of the opinion is omitted.

tion, and which money was paid to defendants for the mining option, was obtained by the issuing of full-paid shares to the stockholders. * * * Under the allegations of the complaint we must treat the alleged sale of the mining option to the defendant Main for the entire stock of the corporation, viz., $1,000,000, as a mere subterfuge and device to cover up the real transaction, which is substantially as follows:

The defendants, having obtained a right to purchase the mining option mentioned in the complaint for $20,000, proceeded to form a corporation to make such purchase, representing to the persons who subscribed for the stock that it would cost $90,000 to make such purchase, and, having first induced other persons to subscribe for the stock upon such representations, and to pay to the corporation upon or for their stock $100,000, the corporation then, through its officers, the defendants themselves, purchased the option for $90,000, paying the $20,000 which it cost them with the money received by the corporation, and converting the $70,000 to their own use. This is the substance of what is alleged to have been done by the company, and it appears to me to be immaterial as to the manner of doing it. It being shown that the defendants formed the company for the purpose of purchasing this option, and having induced the present stockholders to furnish $90,000 of their money to make the purchase under the false impression created by the defendants that the defendants would be compelled to pay that amount for the purchase price, and the defendants having afterwards, as officers and agents of the company, purchased for the company such option, and paid themselves $70,000 more than they knew they could purchase it for, and $70,000 more than they in fact paid for the same, it seems to me there can be no doubt of their liability to refund to the corporation the $70,000 so obtained. In making this statement we are not to be understood as making any charge of fraud or unfair dealing on the part of the very respectable citizens who are the defendants in this action; all that is intended is that, admitting that the allegations of the complaint in this action are true, then the result indicated follows. The truth or falsity of these statements are not now under consideration. For the purposes of this case, the defendants do not controvert them.

That the defendants were promoters of the corporation, and as such, and as the officers of the same, they assumed the position of agents and trustees of the corporation in the transaction of its business, admitting the facts to be as stated in the complaint to be true, there can be no doubt. This is well established by the following cases cited by the learned counsel for the appellant, viz.: Society v. Abbott, 2 Beav. 559; Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73; and Sewage Co. v. Hartmont, Id. 394; 1 Mor. Priv. Corp. § 291; In re Paper Box Co., L. R. 17 Ch. Div. 471. See,

also, the case of Railroad Co. v. Tiernan, cited by the learned counsel for the respondents, 15 Pac. 558, 559.

Assuming that these defendants were the promoters of this corporation, and it being alleged in the complaint that two of them were the officers of the corporation when the sale and purchase were made, they must be treated as the agents and trustees of the corporation, and as such their duties and obligations towards it are clearly defined by the authorities above cited. The learned judge, in deciding the case of Railroad Co. v. Tiernan, cites the rule of law governing their action, as laid down by the supreme court of Massachusetts in the cases of Parker v. Nickerson, 137 Mass. 487, and Same v. Same, 112 Mass. 195. In these cases the rule is stated as follows: "A trustee or agent cannot purchase on his own account what he sells on account of another, nor purchase on account of another what he sells on his own account; * * * and, if he does so, the cestui que trust or principal, unless upon the fullest knowledge of all the facts he elects to confirm the act of the trustee or agent, may repudiate it, or he may charge the profits made by the trustee or agent with an implied trust for his benefit." See Tyrrell v. Bank, 10 H. L. Cas. 26; Kimber v. Barber, L. R. 8 Ch. 56; Simons v. Mining Co., 61 Pa. 202. This rule has been sanctioned and affirmed by this court. See Puzey v. Senier, 9 Wis. 370; Pickett v. School-Dist., 25 Wis. 551; Cook v. Mill Co., 43 Wis. 433; In re Orphan Asylum, 36 Wis. 534.

Construed as I think the allegations in this case ought to be construed upon a demurrer, they present the case of trustees and agents of the corporation selling property to the corporation on the one hand, and on the other hand buying for the corporation and making a profit for themselves by the transaction of $70,000. Under the rule of law above stated the corporation may charge such profits made by the trustees and agents with an implied trust for the benefit of the corporation, and may recover such money in an action brought by the corporation.

It is urged against this claim that at the time of the sale and purchase there were no persons interested in the corporation except the said agents and trustees themselves, and so no one was injured, as all parties then interested were fully aware of all the facts. We do not think this a true statement of the case. According to the allegations of the complaint, all the present owners of the stock were interested parties. They were in fact the corporation, and the defendants represented them in making the sale, and not merely themselves.

The relations which the defendants bore to the corporation in this case, according to the facts alleged in the complaint, are well stated by Chief Justice Thompson in the case of Simons v. Mining Co., supra. After stating that it was claimed that the organized board of

directors was the company, and whatever it did could not be inquired into by the corporation put in motion by the instance of the stockholders, he says: "This is an error, and results from overlooking the fact that directors are but the agents and trustees of the company; that they have power to act only for the interest of the company, and not against it. The shareholders constitute the company, where there is stock, and not the directors. It was therefore well put in the charge of the learned judge that the directors had no power to bind the stockholders by allowing profits to the defendants, after holding out in their prospectus that the property was obtained at original prices, and that the defendants could not claim any if they hold out that they had purchased the property for the company, and were conveying at original prices. A fraud perpetrated against the corporation by any or all of the directors may assuredly be redressed by such an action in the name of the corporation. As already said, they are its agents and trustees, which implies accountability to their principal."

In the case of In re Paper Box Co., L. R. 17 Ch. Div. 471, the master of the rolls says: "I quite agree to this: that, if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after. In both cases it is intended to cheat the future shareholders, and of course it makes no difference whatever that the persons who at the time the allotment was made were in fact the promoters, or their nominees, knew of the fraud."

It seems to me, unless we are prepared to go contrary to the cases above cited, and to very many others cited in the brief of the appellant, we must hold that an action can be maintained in the name of the corporation to redress the wrong alleged to have been done by the defendants.

What would have been the relations of the defendants to the corporation if they had in fact owned the mining option, and had formed the corporation and issued full-paid stock to themselves for such option, and transferred such stock to themselves in payment for such mining option, and then, by exaggerated or false statements as to the value of such mining option, or as to its actual cost, had induced others to purchase from them such stock, need not be determined in this action; nor whether in such case any action for such fraud could be maintained by the corporation. Under the allegations of the complaint, such was not the transaction in this case. In this case no sale to or purchase by the corporation was made until all the stock, or nearly all, had been agreed to be taken by other parties than the defendants, and, although the written agreement which they signed stated that they were to buy the stock of

defendants, the allegations of the complaint show that at the time such contract was signed by the present stockholders the defendants did not have or own any of the stock of the corporation, nor did they own the mining option. The allegations also show that no stock was ever issued to the defendants except to the amount of $25,000, and the balance of the stock was issued by the corporation directly to the present holders; and the mining option was bought by the defendants and sold to the company after such stock had been subscribed and paid for by the present stockholders, with the money paid by the stockholders to the corporation.

What is said by the learned author (1 Mor. Priv. Corp. § 292, p. 279) in commenting upon the Sombrero Phosphate Co. Case is peculiarly applicable to the case at bar. In discussing the question whether the action would lie in favor of the corporation he says: "Before any shares had been issued the existence of the company was a fiction. The shareholders really formed the company, each one becoming a member when he took his shares. While the contract for the purchase of the property was nominally in force from the time of its approval by the board of directors, yet it really took effect only after the shareholders had taken their shares. It then became binding upon all the shareholders collectively, or, in other words, on the company. The fraud really consisted in inducing the shareholders to enter into this contract in their collective capacity, and in using the funds belonging to the shareholders collectively in paying the purchase price. It is evident, therefore, that the injury to the shareholders was an injury to their collective or corporate interests, and that the company was the proper complainant."

These remarks are strictly applicable to the transaction in this case. It is true that it is alleged that the defendants formed a corporation under the statutes of this state, and that such corporation passed a resolution to permit the defendant Main to subscribe for the whole capital stock, and pay for it by a transfer of the mining option to the corporation; but it appears from the complaint that before this was done an agreement had been made between the defendants and the corporation that other persons should become the owners of the stock of the corporation, and pay a certain sum of money for such stock, and thereby become the real parties constituting the corporation, and that their money should pay for the mining option; and it further appears that the transfer was not made to the corporation until after the real stockholders had become such by paying their money for the stock. The fraud in the sale was therefore a fraud upon the collective interests of the shareholders, as it was in the Sombrero Phosphate Co. Case.

Taking all the allegations of the complaint together, they charge the defendants with purchasing the mining option for the sum of $20,000 from themselves for the benefit of the corporation, the cor-

poration at the time of the sale and purchase representing the present holders of its stock, and not simply the interest of themselves. That this complaint states a good cause of action in favor of the corporation against the defendants, we think, is well settled upon principles and authority. The cases of Sombrero Phosphate Co. v. Eranger, Sewage Co. v. Hartmont, and Simons v. Mining Co., supra, as well as many of the other cases cited in the brief of the counsel for the appellant, very clearly sustain this action. * * *

We think the complaint states a good cause of action in favor of the plaintiff, and that the circuit court erred in sustaining the demurrer to the complaint. The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

LYON, J., dissents.

In re BRITISH SEAMLESS PAPER BOX CO.

(Court of Appeal, 1881. L. R. 17, Ch. Div. 467.)

JESSEL, M. R.[46] * * * First of all, as far as I know, there is no case like this. If there were, I should only be too glad to follow it. It is an entirely new case, and entirely distinguishable from that of the Society of Practical Knowledge v. Abbott, 2 Beav. 559, before Lord Langdale, which was a very peculiar case. It was simply this: The company was a chartered company, and by the terms of the charter the shares were to be paid for in cash, and in no other way. The four gentlemen who obtained the charter allotted the shares to themselves without paying for them in cash, and sold them to other people, and then the corporation sued them for the balance of cash due on their allotments. Lord Langdale held that, having regard to the terms of the charter of the corporation, these four gentlemen had no right to allot the shares to themselves except for cash, and therefore that the claim made by the bill was well founded.

That case does not appear to me to have the slightest application to a company formed as this is. The other case of New Sombrero Phosphate Company v. Erlanger appears to me also to have no application. I quite agree to this, that if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after: in both cases it is intended to cheat the future shareholders; and of course it makes no difference whatever that the persons who, at the time the allot-

[46] The statement of facts and part of the opinion have been omitted.

ment was made, were in fact the promoters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees. Therefore that case appears to me to have no direct bearing upon the case before me.

What, then, is this case? I must say I am convinced of the thorough honesty of all parties engaged in the transaction. Of course, to a certain extent, the honesty of the parties engaged in a particular transaction must naturally affect the case in the mind of the Judge who has to consider the transaction; but, as far as I am concerned, I always endeavour to administer justice fairly, according to law, even if it should bear hardly on people, as it sometimes does. I say "fairly," because my mind is affected—as every Judge's mind must be affected—to some extent, at all events, by what I will call the "morality" of the transaction. I should be more anxious to find reasons to trounce a rogue than I should be to find reasons to rob an honest man.

The present question is this: Three Americans, who appear to be inventors, were possessed of a certain patent. Whether it is valuable or not I do not know—it has not been successfully worked in this country; but it was supposed to be valuable. An English engineer of the name of Ransome appears to have had some faith in it; at all events, he agreed to advance £2000 for the purpose of introducing a machine into this country to make seamless paper boxes according to the patent. This he agreed to do under an agreement in writing of a very curious character, and the effect of which it is very difficult to state in a few words. The agreement is dated the 7th of January, 1874. In substance it was this, I think: that he was to advance £2000 to get the machine at work; if he got it to work satisfactorily the company was to be formed, he was to get £2000 worth of shares for his £2000 advanced, the three Americans were to get £30,000 in shares out of a total capital of £50,000, and out of those shares Mr. Ransome was to receive £6,000; but if the machine turned out a failure, and through no fault of Mr. Ransome's, he was then to be entitled to have a fifth of the patent. So that the moment this agreement was signed Mr. Ransome was to be treated as a substantial owner of one-fifth part of the patent. That was the substance of the agreement.

Then a meeting of the promoters was called, at which three other gentlemen were present. They divided the interest with the Englishman, and they agreed to get up a company on the footing of this agreement of 1874; they not only knew all about it, but their arrangement was to form a company on that footing; and it having been arranged to form what I will call for this purpose a private company—for it was not intended to come before the public at all—a formal agreement, not a real agreement, was made on the 27th of February, 1875, between the three Americans of the one part, and

a Mr. Bennett, who was their nominee, of the other part, for the nominal sale to the company of the patents for £32,000 in shares. Of course this was a mere bit of form, with the view of launching the company. The company was registered on the 4th of March, and contemporaneously they prepared a memorandum of association to carry out the formal agreement, with articles of association making all the members of the company directors, with the exception of the solicitor, who knew all about the formation of the company and was the only additional person who came in to sign the memorandum of association. The result was that, at the time of the formation of the company, the company consisted of eight men, and it was not intended to consist of any more. There was power, of course, to issue the remainder of the shares, but the intention of these eight men was to carry on the company with these shares, and accordingly we find this, that there is a meeting of directors after the company is formed, ratifying the formal agreement of 1875 and allotting the shares, and allotting them on the principle of recognizing the agreement of 1874, of which they were all aware, and which is actually mentioned by its date in one of the early meetings of the directors: so that they recognize Mr. Ransome's right to be treated as one of the vendors, and to be paid his share of the purchase-money.

That being so, it appears—though not so clearly as might be—that the other directors thought that Mr. Ransome had incurred expenses to the extent of £3000; but when they found that he had only paid £2000, they insisted that the other £1000 should be applied by him in taking up £1000 worth of shares, which he did; and then, again, a few days after the formation of the company, it seems that five shares apiece extra were given to the Messrs. Stevens (I will assume that it was a bonus), apparently with the knowledge of everybody, in consideration of their having furnished the capital, which they in fact did.

Now, if this company had been intended to be formed as a company in which the shares were to be taken by the public, and a prospectus had been issued immediately after these transactions, concealing them from the allottees, and the allottees had come in, and afterwards, with reasonable promptitude, repudiated the contract, I think a great deal could have been said in favor of their contention; but that is not the case. The company went on, as they intended to go on, with these eight people. In 1875 there is a regular general meeting of the company, and the seal of the company is put to the register of shareholders, treating it as then complete. I then find another regular meeting of shareholders held on the 30th of June, 1876, and at that time there are still only eight shareholders, so that the position of the company up to June, 1876, was this, that every member of the company was perfectly well aware of the whole of the transaction. It was confirmed in March, 1875, and the members

carried on business for the whole period—that is, from March, 1875, to June, 1876—without attempting to repudiate the transaction, even if they could have repudiated it.

What then was the position of the company—not the promoters only—as regards the vendors and as regards Mr. Ransome? They are actually the same people with the exception of Mr. Tindell, but the company itself had adopted this contract of 1874 with full knowledge of every member of it (which is a case I never heard of before), without any intention of bringing in any other shareholder, without any notion of defrauding any future allottee, and had made this bargain with knowledge of the facts. Is it possible to say that the company is not bound by that? It would be impossible to say so. The transaction was entirely bona fide in every respect.

What occurred subsequently was this: In June, 1876, the company wanted more capital; Messrs. Stevens and the other English shareholders were willing to contribute a little more, but not enough; five gentlemen, who were strangers, then came in and joined the company, and they had an allotment of shares to a considerable amount no doubt, but not to a large amount. I agree it would have been right that the agreement of 1874 should have been stated in the memorandum and articles of association, and that is one reason why I am not disposed to give costs to these gentlemen, because I think their neglect in not so stating it has induced the liquidator to make this application; but, even assuming (and this is a point upon which I give no opinion, because I have not heard the evidence fully) that the people who subsequently came in did not know what the original transaction was, they would have no right to bring an action on the facts, and say they were thereby induced to become members of the company; that is, if they were defrauded at all. I give no opinion as to what their state of knowledge was, because there is a conflict of evidence about it; but I cannot see that that would make those persons guilty of misfeasance who had actually entered into a contract with a bona fide company carrying on business, every article of which contract was known to every member of the company.

It appears to me that on the 30th of June, 1876, the company, having acted on the contract with that knowledge, the subsequent allotment of a portion of the shares not being part of the scheme originally contemplated, were not bound to alter the relations between the company and their vendors, and consequently that this application which is made by the liquidator under the 165th section of the Companies Act, 1862, must fail.

From this judgment the official liquidator appealed. The appeal was heard on the 5th of April, 1881.

JAMES, L. J. It appears to me that the Master of the Rolls has really put the matter on the true footing in that passage of his judgment in which he makes the question resolve itself into one of hon-

esty or dishonesty. He was of opinion, and I agree with him, that the directors were, and intended to be, thoroughly honest, and that they were, and intended to remain, the sole proprietors of the property of the company and the sole members of the company, and that whatever agreements they chose to make among themselves as to the division of the property, concerned themselves alone. That being so, it distinguishes this case from the case of the Society of Practical Knowledge v. Abbott, because in all these cases, when anything like a bonus has been given to directors, and it is called in question by allottees of shares, the burden of proof is thrown on those who have received it, to satisfy the Court that it was intended to be and was in fact honestly received. If they were intending, although then constituting the whole company, that other people should come in afterwards to whom what had been done would be injurious, the Court would feel no difficulty in saying, as Lord Langdale did in Society of Practical Knowledge v. Abbott, 2 Beav. 559, that they intended to commit a fraud. Here there was nothing of that kind. That is the ground taken by the Master of the Rolls, and I concur in his opinion. It is said that our decision in favour of these directors may open a door for dishonest practices in future. But I think we ought not to punish an honest man for an action in order that it may discourage dishonest men from doing something like it. The appeal must be dismissed with costs.[47]

OLD DOMINION COPPER MINING & SMELTING CO., Petitioner, v. LEWISOHN et al.

(Supreme Court of the United States, 1907. 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025.)

On writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of New York, sustaining a demurrer to, and dismissing, a bill brought by a corporation to rescind a sale of property to it by its promoters. Affirmed.

See same case below, 79 C. C. A. 534, 148 Fed. 1020.

Mr. Justice HOLMES delivered the opinion of the court:

This is a bill in equity brought by the petitioner to rescind a sale to it of certain mining rights and land by the defendants' testator, or, in the alternative, to recover damages for the sale. The bill was demurred to and the demurrer was sustained. 136 Fed. 915. Then the bill was amended and again demurred to, and again the demurrer was sustained, and the bill was dismissed. This decree was affirmed by the circuit court of appeals. 79 C. C. A. 534, 148 Fed.

[47] The concurring opinions of Brett and Cotton, L. JJ., have been omitted.

1020. The ground of the petitioner's case is that Lewisohn, the deceased, and one Bigelow, as promoters, informed the petitioner that they might sell certain properties to it at a profit; that they made their sale while they owned all the stock issued, but in contemplation of a large further issue to the public without disclosure of their profit, and that such an issue in fact was made. The supreme judicial court of Massachusetts has held the plaintiff entitled to recover from Bigelow upon a substantially similar bill. 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653.

The facts alleged are as follows:

The property embraced in the plan was the mining property of the Old Dominion Copper Company of Baltimore, and also the mining rights and land now in question, the latter being held by one Keyser, for the benefit of himself and of the executors of one Simpson, who, with Keyser, owned the stock of the Baltimore company. Bigelow and Lewisohn, in May and June, 1895, obtained options from Simpson's executors and Keyser for the purchase of the stock and the property now in question. They also formed a syndicate to carry out their plan, with the agreement that the money subscribed by the members should be used for the purchase and the sale to a new corporation, at a large advance, and that the members, in the proportion of their subscriptions, should receive in cash or in stock of the new corporation the profit made by the sale. On May 28, 1895, Bigelow paid Simpson's executors for their stock on behalf of the syndicate, in cash and notes of himself and Lewisohn, and in June Keyser was paid in the same way.

On July 8, 1895, Bigelow and Lewisohn started the plaintiff corporation, the seven members being their nominees and tools. The next day the stock of the company was increased to 150,000 shares of $25 each, officers were elected, and the corporation became duly organized. July 11, pursuant to instructions, some of the officers resigned, and Bigelow and Lewisohn and three other absent members of the syndicate came in. Thereupon an offer was received from the Baltimore company, the stock of which had been bought, as stated, by Bigelow and Lewisohn, to sell substantially all its property for 100,000 shares of the plaintiff company. The offer was accepted, and then Lewisohn offered to sell the real estate now in question, obtained from Keyser, for 30,000 shares, to be issued to Bigelow and himself. This also was accepted and possession of all the mining property was delivered the next day. The sales "were consummated" by delivery of deeds, and afterwards, on July 18, to raise working capital, it was voted to offer the remaining 20,000 shares to the public at par, and they were taken by subscribers who did not know of the profit made by Bigelow and Lewisohn and the syndicate. On September 18 the 100,000 and 30,000 shares were issued, and it was voted to issue the 20,000 when paid for.

The bill alleges that the property of the Baltimore company was not worth more than $1,000,000, the sum paid for its stock, and the property here concerned not over $5,000, as Bigelow and Lewisohn knew. The market value of the petitioner's stock was not less than par, so that the price paid was $2,500,000, it is said, for the Baltimore company's property, and $750,000 for that here concerned. Whether this view of the price paid is correct, it is unnecessary to decide.

Of the stock in the petitioner, received by Bigelow and Lewisohn or their Baltimore corporation, 40,000 shares went to the syndicate as profit, and the members had their choice of receiving a like additional number of shares or the repayment of their original subscription. As pretty nearly all took the stock, the syndicate received about 80,000 shares. The remaining 20,000 of the stock paid to the Baltimore company, Bigelow and Lewisohn divided, the plaintiff believes, without the knowledge of the syndicate. The 30,000 shares received for the property now in question they also divided. Thus the plans of Bigelow and Lewisohn were carried out.

The argument for the petitioner is that all would admit that the promoters (assuming the English phrase to be well applied) stood in a fiduciary relation to it, if, when the transaction took place, there were members who were not informed of the profits made and who did not acquiesce, and that the same obligation of good faith extends down to the time of the later subscriptions, which it was the promoters' plan to obtain. It is an argument that has commanded the assent of at least one court, and is stated at length in the decision. But the courts do not agree. There is no authority binding upon us and in point. The general observations in Dickerman v. Northern Trust Co., 176 U. S. 181, 44 L. Ed. 423, 20 Sup. Ct. 311, were obiter, and do not dispose of the case. Without spending time upon the many dicta that were quoted to us, we shall endeavor to weigh the considerations on one side and the other afresh.

The difficulty that meets the petitioner at the outset is that it has assented to the transaction with the full knowledge of the facts. It is said, to be sure, that on September 18, when the shares were issued to the sellers, there were already subscribers to the 20,000 shares that the public took. But this does not appear from the bill, unless it should be inferred from the ambiguous statement that on that day it was voted to issue those shares "to persons who had subscribed therefor," upon receiving payment, and that the shares "were thereafter duly issued to said persons," etc. The words "had subscribed" may refer to the time of issue and be equivalent to "should have subscribed," or may refer to an already past event. But that hardly matters. The contract had been made and the property delivered on July 11 and 12, when Bigelow, Lewisohn, and some other members of the syndicate held all the outstanding stock, and it is

alleged in terms that the sales were consummated before the vote of July 18, to offer stock to the public, had been passed.

At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. Salomon v. A. Salomon & Co. [1897] A. C. 22; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159; Tompkins v. Sperry, 96 Md. 560, 54 Atl. 254. If there was a wrong, it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation nunc pro tunc, but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers' position and the promoter's invitation that the corporation has any pretense for a standing in court. If the promoters, after starting their scheme, had sold their stock before any subscriptions were taken, and then the purchasers of their stock, with notice, had invited the public to come in, and it did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now.

But it is said that, from a business point of view, the agreement was not made merely to bind the corporation as it then was, with only 40 shares issued, but to bind the corporation when it should have a capital of $3,750,000; and the implication is that practically this was a new and different corporation. Of course, legally speaking, a corporation does not change its identity by adding a cubit to its stature. The nominal capital of the corporation was the same when the contract was made and after the public had subscribed. Therefore, what must be meant is, as we have said, that the corporation got a new right from the fact that new men, who did not know what it had done, had put in their money and had become members. It is assumed in argument that the new members had no ground for a suit in their own names, but it is assumed also that their position changed that of the corporation, and thus that the indirect effect of their acts was greater than the direct; that facts that gave them no claim gave one to the corporation because of them, notwithstanding its assent. We shall not consider whether the new members had a personal claim of any kind, and therefore we deal with the case without prejudice to that question, and without taking advantage of what we understand the petitioner to concede.

But, if we are to leave technical law on one side, and approach the case from what is supposed to be a business point of view, there are new matters to be taken into account. If the corporation recovers,

all the stockholders, guilty as well as innocent, get the benefit. It is answered that the corporation is not precluded from recovering for a fraud upon it, because the party committing the fraud is a stockholder. Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 327, 108 Am. St. Rep. 479, 74 N. E. 653. If there had been innocent members at the time of the sale, the fact that there were also guilty ones would not prevent a recovery, and even might not be a sufficient reason for requiring all the guilty members to be joined as defendants in order to avoid a manifest injustice. Stockton v. Anderson, 40 N. J. Eq. 486, 4 Atl. 642. The same principle is thought to apply when innocent members are brought in later under a scheme. But it is obvious that this answer falls back upon the technical diversity between the corporation and its members, which the business point of view is supposed to transcend, as it must, in order to avoid the objection that the corporation has assented to the sale with full notice of the facts. It is mainly on this diversity that the answer to the objection of injustice is based in New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73, 114, 122.

Let us look at the business aspect alone. The syndicate was a party to the scheme to make a profit out of the corporation. Whether or not there was a subordinate fraud committed by Bigelow and Lewisohn on the agreement with them, as the petitioner believes, is immaterial to the corporation. The issue of the stock was apparent, we presume, on the books, so that it is difficult to suppose that at least some members of the syndicate, representing an adverse interest, did not know what was done. But all the members were engaged in the plan of buying for less and selling to the corporation for more, and were subject to whatever equity the corporation has against Bigelow and the estate of Lewisohn. There was some argument to the contrary, but this seems to us the fair meaning of the bill. Bigelow and Lewisohn, it is true, divided the stock received for the real estate now in question. But that was a matter between them and the syndicate. The real estate was bought from Keyser by the syndicate, along with his stock in the Baltimore company, and was sold by the syndicate to the petitioner, along with the Baltimore company's property, as part of the scheme. The syndicate was paid for it, whoever received the stock. And this means that $^{2}/_{15}$ of the stock of the corporation, the 20,000 shares sold to the public, are to be allowed to use the name of the corporation to assert rights against Lewisohn's estate that will inure to the benefit of $^{13}/_{15}$ of the stock that are totally without claim. It seems to us that the practical objection is as strong as that arising if we adhere to the law.

Let us take the business point of view for a moment longer. To the lay mind it would make little or no difference whether the 20,000 shares sold to the public were sold on an original subscription to the articles of incorporation or were issued under the scheme to some

of the syndicate and sold by them. Yet it is admitted, in accordance with the decisions, that, in the latter case, the innocent purchasers would have no claim against anyone. If we are to seek what is called substantial justice, in disregard of even peremptory rules of law, it would seem desirable to get a rule that would cover both of the almost equally possible cases of what is deemed a wrong. It might be said that if the stock really was taken as a preliminary to selling to the public, the subscribers would show a certain confidence in the enterprise, and give at least that security for good faith. But the syndicate believed in the enterprise, notwithstanding all the profits that they made it pay. They preferred to take stock at par rather than cash. Moreover, it would have been possible to issue the whole stock in payment for the property purchased, with an understanding as to 20,000 shares.

Of course, it is competent for legislators, but not, we think, for judges, except by a quasi legislative declaration, to establish that a corporation shall not be bound by its assent in a transaction of this kind, when the parties contemplate an invitation to the public to come in and join as original subscribers for any portion of the shares. It may be said that the corporation cannot be bound until the contemplated adverse interest is represented, or it may be said that promoters cannot strip themselves of the character of trustees until that moment. But it seems to us a strictly legislative determination. It is difficult, without inventing new and qualifying established doctrines, to go behind the fact that the corporation remains one and the same after once it really exists. When, as here, after it really exists, it consents, we at least shall require stronger equities than are shown by this bill to allow it to renew its claim at a later date because its internal constitution has changed.

To sum up: In our opinion, on the one hand, the plaintiff cannot recover without departing from the fundamental conception embodied in the law that created it,—the conception that a corporation remains unchanged and unaffected in its identity by changes in its members. Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 273, 28 Sup. Ct. 288, 52 L. Ed. 481; Salomon v. A. Salomon & Co. [1897] A. C. 22, 30. On the other hand, if we should undertake to look through fiction to facts, it appears to us that substantial justice would not be accomplished, but rather a great injustice done, if the corporation were allowed to disregard its previous assent in order to charge a single member with the whole results of a transaction to which $^{13}/_{15}$ of its stock were parties, for the benefit of the guilty, if there was guilt in any one, and the innocent alike. We decide only what is necessary. We express no opinion as to whether the defendant properly is called a promoter, or whether the plaintiff has not been guilty of laches, or whether a remedy can be had for a part of a single transaction in the form in which it is sought, or whether there

was any personal claim on the part of the innocent subscribers, or as to any other question than that which we have discussed.

The English case chiefly relied upon, Erlanger v. New Sombrero Phosphate Co., L. R. 3 App. Cas. 1218, Affirming L. R. 5 Ch. Div. 73, seems to us far from establishing a different doctrine for that jurisdiction. There, to be sure, a syndicate had made an agreement to sell, at a profit, to a company to be got up by the sellers. But the company, at the first stage, was made up mainly of outsiders, some of them instruments of the sellers, but innocent instruments, and, according to Lord Cairns, the contract was provisional on the shares being taken and the company formed. (P. 1239.) There never was a moment when the company had assented with knowledge of the facts. The shares, with perhaps one exception, all were taken by subscribers ignorant of the facts (L. R. 5 Ch. Div. 113), and the contract seems to have reached forward to the moment when they subscribed. As it is put in 2 Morawetz, Priv. Corp. (2d Ed.) § 292, there was really no company till the shares were issued. Here $^{13}/_{15}$ of the stock had been taken by the syndicate, the corporation was in full life, and had assented to the sale with knowledge of the facts before an outsider joined. There, most of the syndicate were strangers to the corporation, yet all were joined as defendants. (P. 1222.) Here, the members of the syndicate, although members of the corporation, are not joined, and it is sought to throw the burden of their act upon a single one.

Gluckstein v. Barnes [1900] A. C. 240, certainly is no stronger for the plaintiff, and in Yeiser v. United States Board & Paper Co., 52 L. R. A. 724, 46 C. C. A. 567, 107 Fed. 340, another case that was relied upon, the transaction equally was carried through after innocent subscribers had paid for stock. Decree affirmed.[48]

DENSMORE OIL CO. v. DENSMORE et al.

(Supreme Court of Pennsylvania, 1870. 64 Pa. 43.)

SHARSWOOD, J.[49] There are two principles applicable to all partnerships or associations for a common purpose of trade or business, which appear to be well settled on reason and authority.

The first is, that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or

[48] Contra: Old Dominion Copper Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193 (1908); s. c., 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479 (1905); Hayward v. Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725 (1900); Mason v. Carrothers, 105 Me. 392, 74 Atl. 1030 (1909); Pletsch v. Milbrath, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, 68 L. R. A. 945, 107 Am. St. Rep. 1017 (1905). Compare: Erlanger v. New Sombrero Phosphate Co., L. R. 3 App. Cas. 1218 (1878); Gluckstein v. Barnes, A. C. 240 (1900).

[49] The statement of facts and the arguments of counsel are omitted.

association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. They were in no sense agents or trustees in the original purchase, and it follows, that there is no confidential relation between the parties, which affects them with any trust. It is like any other case of vendor and vendee. They deal at arms' length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy. As it is succinctly and well stated in Foss v. Harbottle, 2 Hare, 489: "A party may have a clear right to say, I begin the transaction at this time. I have purchased land, no matter how or from whom, or at what price. I am willing to sell it at a certain price for a given purpose."

This principle was recognized and applied by this court in the recent case of McElhenny's Administrators v. Hubert Oil Co., decided May 11, 1869 (61 Pa. 188). "It nowhere appears," said the present Chief Justice, "that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co. and others, though he bought it to sell again, no doubt; he had a perfect right, therefore, to deal with them at arms' length, as it seems he did." And again: "If the property was not purchased by McElhenny for the use, and as agent for the company, but for his own use, he might sell it at a profit, most assuredly. No subsequent purchasers from his vendees would have any right to call upon him to account for the profits made on his sale." In that case, McElhenny, being the owner of property which had cost him only $4,000, sold it to Baird, Boyd & Co., and others, who associated with him to form an oil company for $12,000, and it was decided that the company could not call him in equity, to account for the profit he had made.

The second principle is, that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs. It is a familiar principle of the law of partnership, one partner cannot buy and sell to the partnership at a profit; nor if a partnership is in contemplation merely, can he purchase with a view to a future sale, without accounting for the profit. Within the scope of the partnership business, each associate is the general agent of the others, and he cannot divest himself of that character without their knowledge and consent. This is the principle of Hichens v. Congrove, 4 Russ. 562, Fawcett v. White-

house, 1 Russ. & M. 132, and the other cases which have been relied on by the appellants. It was recognized in McElhenny's Admin'rs v. Hubert Oil Co., just cited; and also in Simons v. Vulcan Oil Co., decided by this court May 11, 1869 (61 Pa. 202, 100 Am. Dec. 628). Both of these cases were complicated with evidence of actual misrepresentations as to the original cost of the property to the vendors. In the opinion of the court in the last case, delivered by Thompson, C. J., it is said: "If the defendants in fact, acted as the agents of the company in acquiring the property, they could not charge a profit as against their principal. Nor was their position any better if they assumed so to act without precedent authority, if their doings were accepted as the acts of agents by the association or company. If, in order to get up a company, they represented themselves as having acted for the association to be formed, and proposed to sell at the same prices they paid, and their purchases were taken on these representations, and stockholders invested in a reliance upon them, it would be a fraud on the company, and all those interested, to allow them to retain the large profits paid them by the company in ignorance of the true sums actually advanced." The defendants in that case were subscribers with others, to the stock of a projected oil company, and after the plan had been formed, secured to themselves by contract, the refusal of the property which they afterwards sold to the company at a greatly advanced price.

The question now presented is, under which of these two principles is the present case to be classified? That will depend upon the facts, which, though the testimony is somewhat voluminous, may be briefly stated. Densmore, Roudebush and Canfield, three of the defendants, were the owners of certain lands, leases and rights, in Venango county, in the oil region. They had acquired them, so far as appears, with no idea of disposing of them, or of forming a company, but had spent over $100,000 in improving and developing them while they were owners. In March, 1864, they came to Philadelphia to ascertain whether they could be sold to advantage. They called upon Mr. Lawrence, another of the defendants, and consulted him as to the best mode of effecting this object. They stated that they were willing to accept $202,000, provided that sum could be procured clear of all expenses. That seemed impossible, unless by naming a price so much beyond that sum as would cover all such probable expenses and contingencies. The only mode by which so large an amount could be realized, was by the organization of a stock company, and to do that effectively persons must be employed as agents to sell or solicit subscriptions to the stock; and they must be gentlemen of character and influence, well acquainted with the subject, who could bring the land to the notice of those desirous of engaging in such an enterprise. The amount to be raised was large; the result uncertain. Several agents must be employed, and their compensation

must be at a liberal rate. It was arranged that the price should be fixed at $250,000; that the stock should be 50,000 shares at $10 a share, and $5 to be paid in cash. Mr. Densmore and his associates agreed to take $122,500 in money, and the balance in stock, and that from this stock they would compensate the agents for their services. Mr. Densmore, who was examined as a witness on behalf of the appellants, testified: "The $122,500 was the proceeds of the sale of 24,500 shares. That added to the 16,000 shares we were to get, amounted to 40,500 shares. The arrangement as I understood it was, that Messrs. Lawrence, Hugel, Watson, and perhaps parties unknown to me, were to receive the balance of the stock for their services in forming the company, and disposing of the stock." The gentlemen named were accordingly engaged for this purpose. They proceeded and did sell the 24,500 shares in order to make the cash payment. There was no subscription paper. Mr. Lawrence and his associates did not subscribe for any stock. They did not appear, and were not held out as subscribers to those who made purchases from them. It is true, that after the company was organized, the stock which they were to receive from Densmore, Roudebush and Canfield, as a compensation for their services, was issued to them directly—not to the vendors, and by them transferred. But this was done by a special order, as is satisfactorily explained in the testimony of E. B. Schneider: "I heard Mr. Densmore request Mr. Lawrence to have the Densmore stock, which he (Mr. Lawrence), Watson, Hugel and Whitney, were entitled to, issued direct to themselves, as he might not be here when the certificates would be ready." It has not been, and cannot be controverted, that the stock which they received was part of that, which under the original terms of sale, Densmore, Roudebush and Canfield, were to have in payment of the purchase-money.

Now it can hardly be questioned, and indeed, apart from their alleged liability as confederates with the other defendants, it has not been questioned, that Densmore, Roudebush and Canfield, fall within the first principle hereinbefore stated. They had, for a considerable time, been the owners of the property, had acquired it with no reference to the formation of this or any other company and had improved and developed it by a very large outlay of their own capital. They had a clear and undoubted right to put their own price upon it in the formation of a company, in which they were to be partners or associates.[50] They did put upon it the price of $250,000, which it is admitted at the rates at which such property was then selling in the market, was a fair and reasonable, nay, even a low price. "From my knowledge of mining properties in the oil region at the time," said N. B. Browne, Esq., in his testimony, "and especially of the

[50] See Bentinck v. Fenn, L. R. 12 App. Cas. 652 (1887); Milwaukee Cold Storage Co. v. Dexter, 99 Wis. 214, 74 N. W. 976, 40 L. R. A. 887 (1898).

leasehold and other interests conveyed to this company, I regarded their interests at the price named, $250,000, as cheaper than any that were offered in this market. Their actual productive value was very great; the leases were on what was regarded as the best territory on Oil Creek." Had Messrs. Densmore, Roudebush and Canfield, employed no agents, but sold all the stock themselves, the transaction as to them could not have been impeached. They certainly stood in no confidential relation to the subscribers or purchasers of the stock in the future, when they acquired the property. This is necessary, as we have seen. A company or partnership must have been then formed or forming, or at least the project must have been started, in order that any confidential relation should arise. How then is their position varied by the fact that they employed agents and agreed to compensate these agents by a transfer of a certain part of the stock they were to receive? It is not easy to see. The whole $250,000, money and stock, when received, was their own absolute property; they could give or transfer it to whomsoever they pleased. If, as we have seen, they stood in no confidential relation to the company, no trust could attach to the price or any part of it in their hands. We may dismiss, therefore, the case of Messrs. Densmore, Roudebush and Canfield, as clearly within the first principle to which we have before adverted.[51]

But what confidential relation did the other defendants sustain to the purchasers of the stock or to the company? It is a clear and unquestionable fact in the cause that they did not subscribe for a single share. Their contract was with Densmore, Roudebush and Canfield, to receive from them a part of their stock. Without an order from them, Mr. Lawrence and the others could not have compelled the company to issue any of it to them. If Densmore, Roudebush and Canfield, had received all the certificates to which they were entitled, and then refused to transfer, the only remedy of Messrs. Lawrence and others, would have been against them to recover damages for violation of their contract. It is clearly proved that the paper among the exhibits headed "Subscription List to the Densmore Oil Company," was made out by Mr. Lawrence after the organization as a list of those to whom certificates of stock were to be issued. The names of Lawrence, Whitney, Watson, and Hugel, appeared on that list, but clearly only as appointees or assignees of Densmore, Roudebush, and Canfield. The same appointment or order might have been given by them to mere strangers.

It is strenuously contended, however, that if these defendants did not stand in a confidential relation to the purchasers of stock, then there was nobody who stood in that relation. But is there anything

[51] See Lydney Megpoal Iron Ore Co. v. Bird, L. R. 33 Ch. Div. 85 (1886); The Telegraph v. Loetscher, 127 Iowa, 383, 101 N. W. 773, 4 Ann. Cas. 667 (1904).

extraordinary in that? Nine-tenths of the transactions and contracts of life are at arms' length. If a man buys stock in the market of a broker, there is nobody who stands in any fiduciary relation to him. He acts on his own judgment. He is bound to pay the broker the price agreed, and the broker is bound when paid to deliver him the stock. This was the only relation in which Lawrence, Whitney, Hugel and Watson stood to those who bought stock from them, and who according to all the testimony in the cause, so understood it. They supposed, as they state, that these gentlemen were to receive compensation for their services. What it was to be they did not inquire, because it was none of their business.

A strong effort, however, has been made, to show that these defendants, Lawrence, Whitney, Watson and Hugel, were purchasers from Densmore, Roudebush and Canfield, of an interest in the property, and sold it at an advance. But of this there is not a spark of evidence. It can hardly be pretended that Densmore, Roudebush and Canfield, could have held them liable on a contract to purchase any interest in the land, or that the agents could in any event have sued them for not conveying to them such interest. If this was so, how can it be contended that they were vendors of any part of the property to the company?

Densmore, Roudebush and Canfield were first and last the only vendors. They executed the deed, and very properly receipted for the whole of the purchase-money, for they were entitled to the whole of it. Nor is the fact that Lawrence, Whitney, Watson and Hugel, joined with Densmore, Roudebush and Canfield, as original corporators, and signed the articles for the organization of the company, under the Act of July 18th, 1863 (Pamph. L. 1864, p. 1102), a fact of any significancy. That act does not require that the corporators should be subscribers to stock. They need have no interest whatever in the company to be formed. They are mere instruments of the law for purposes of preliminary organization. The moment that is accomplished, the amount required as capital paid in, the necessary certificate signed, and the charter granted, they are functi officio. The corporation is thenceforth composed of the stockholders.

It is supposed that the cases of McElhenny's Administrators v. Hubert Oil Co., and Simons v. Vulcan Oil Co., before referred to, ought to rule this cause. But an examination of the opinions in those cases will show that the facts upon which they were decided, were entirely different from those which appear on this record. The defendants there were subscribers to the stock; they became purchasers of the property after the project of a company was started, and moreover, falsely represented that they had purchased it at the same price at which they sold.

These facts, which were the grounds upon which those determinations were based, are not, as we have seen, the facts of this case. It

is not pretended that any false representation was made by any of these defendants in the sale of the stock. Some other points have been raised, which are, however, sufficiently disposed of in the opinion below.

Decree affirmed and appeal dismissed at the costs of the appellants.

II. PROMOTERS' CONTRACTS AND CORPORATE LIABILITY

PENN MATCH CO. v. HAPGOOD et al.

(Supreme Court of Massachusetts, 1886. 141 Mass. 145, 7 N. E. 22.)

The declaration in an action by a corporation alleged that certain persons agreed to form a corporation under general laws, if they could obtain certain machinery from the defendant, and to build a factory for the manufacture of certain goods; that such persons informed the defendant of the premises, and, in the name and for the benefit of the proposed corporation, applied to the defendant, who was a manufacturer of the machinery desired, for such machinery, and informed the defendant that the proposed corporation would proceed with its organization and would build a factory only in case a contract could be made with the defendant for the machinery; that thereupon the defendant made two contracts in writing, one of which was under seal, to furnish the corporation with the machinery upon certain specified terms; that afterwards, in anticipation of the defendant's fulfilling his agreement a factory was built for the corporation; that said machinery could not be procured otherwise than from the defendant, which he well knew; that the persons named, in behalf of the proposed corporation, before its organization was completed, were always ready to receive and pay for said machinery, and frequently demanded the same, but the defendant neglected and refused to furnish said machinery or any part thereof; and that said corporation was now duly organized and existed under the general laws.[52]

W. ALLEN, J. The plaintiff was not in existence when the writings were made, and cannot maintain the actions unless it became a party to the contracts after its incorporation. There is no ground for the contention of the plaintiff that the declaration shows the existence of the corporation, though unorganized, sufficient to be a party to a contract, as in Vermont Cent. R. R. v. Clayes, 21 Vt. 30. All that is alleged is the verbal conditional agreement of certain individuals to form a corporation under general laws. The power of a corporation

[52] Statement of facts substituted.

to make contracts can be exercised in accepting and adopting proposed contracts, made in its name and behalf, before its incorporation. Such a contract must derive its validity from the meeting of minds when both parties are in existence; until then, it can be nothing more than an offer by one party. The writings, as between the plaintiff and the defendants, show no more than proposals by the defendants, revocable at any time before acceptance by the plaintiff after its incorporation. The fact that one is under seal is immaterial in this respect.

The only consideration shown for the defendant's promises is the acceptance of them by the plaintiff, and the promise to accept and pay for the goods implied in that; and the acceptance must be by some act or assent of both parties, which will fix the rights of both, and is as essential to a promise under seal as by parol. The defendants could not be bound until such acceptance by the plaintiff as would give them a right of action against it for a refusal to accept and pay for the goods. There is no allegation of acceptance by the plaintiff after its incorporation. The demand is not stated as an act of acceptance respecting the contract, but, in connection with the refusal, to show a breach of an existing contract.

The plaintiff contends that it was a consideration of the contract, moving from it, that it should perfect its organization, and purchase a building and prepare to carry on business; or that the proposals of the defendants were made in view of these acts, and of the expectation that the plaintiff should accept them when it should be competent to, and should do the other acts relying on the contracts; and that the plaintiff has done the acts accordingly. A corporation may become bound to fulfill a contract made, in its name and behalf, in anticipation of its existence, by afterwards accepting the benefits of the contract, as it may acquire a right to enforce such a contract against the other party by his acceptance of performance by the corporation. Low v. Connecticut & P. R. R. R., 45 N. H. 370, relied on by the plaintiff, is an instance of the former; and the common liability of subscribers of stock, of the latter.

In the case at bar the formation of the corporation and procuring a building were no part of the contract, or of the consideration of it. There was no agreement to do the acts, and the doing of them was not made by the parties a consideration upon which the contract was to arise. The promises or proposals of the defendants, though a motive for doing the acts by the plaintiff, are not alleged to have been inducements offered by the defendants, nor are the acts alleged to have been done at their request. The defendants are not so connected with the acts to be done by the plaintiff that they would have a right to regard the doing of them as the acceptance of the proposals so that, without other acts of acceptance by the plaintiffs, they could have maintained an action against it upon refusal to accept and pay

for the goods. See Dayton, etc., Turnpike Co. v. Coy, 13 Ohio St. 84. The declaration alleges contracts made before the plaintiff had a legal existence, and does not show any contract to which the plaintiff was a party.

Judgment for the defendants.[52]

BATTELLE v. NORTHWESTERN CEMENT & CONCRETE PAVEMENT CO.

(Supreme Court of Minnesota, 1887. 37 Minn. 89, 33 N. W. 327.)

The defendant was incorporated on March 27, 1884. The plaintiff was one of the promoters and organizers of the defendant, and became an incorporator, stockholder, director, and officer. On June 26, 1884, he sold his stock, and ceased to have any interest in the defendant. On January 16, 1884, the plaintiff purchased certain real and personal property used in the business of laying down concrete pavements, giving back a mortgage for part of the purchase money. On March 27, 1884, he sold and conveyed this property to the defendant, which agreed, as alleged, to assume and pay the mortgage. Default was made in the payment of the mortgage, and it was duly foreclosed, the property not selling for enough to pay the whole amount of the mortgage debt. The plaintiff, being liable for the deficiency, brought this action in the district court for Hennepin county, to recover the amount thereof. The action was tried before Lochren, J., and a jury, and plaintiff had a verdict. Among other facts, it appeared on the trial that a preliminary agreement was made by the plaintiff on March 13, 1884, with two other persons, for the transfer of the above-mentioned property to a corporation to be formed, and it was in evidence that the defendant was organized and the transfer was made in pursuance of this agreement; the parties to the preliminary agreement becoming the incorporators. Defendant appeals from an order refusing a new trial.

GILFILLAN, C. J. It is self-evident that a corporation is not bound by engagements of its "promoters," (i. e., those who bring about its organization,) assuming to contract for it in advance. It cannot have agents till it has an existence. The promoters are not the corporation, and their contracts cannot be its contracts. This is so, though the promoters become, at the creation of the corporation, its only stockholders, directors, and officers. After it comes into existence

[52] Accord: Carmody v. Powers, 60 Mich. 26, 26 N. W. 801 (1886).
On a demurrer to a declaration on the same contract by the promoters, it was held that the promoters were entitled to recover. Abbott et al. v. Hapgood et al., 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193 (1889).

and operation, it may, by adopting the engagements thus made for it in advance, make them its contracts, precisely as it might make similar contracts had no previous engagements been entered into. There can be no difference between its making a contract by adopting an agreement originally made in advance for it by promoters, and its making an entirely new contract. No greater formality can be required in the one case than in the other; and if it could make an entirely new similar contract, without the use of its seal, or without writing, or without formal action of its board of directors, it may also so adopt an agreement assumed to be made for it in advance by promoters. It is not requisite that such adoption or acceptance be express, but it may be shown from acts or acquiescence of the corporation or its authorized agents as any similar contract may be shown.

It is true that the relations between the promoters and the agents and shareholders may be such, or the engagements made in advance by the promoters be of such a character, that the matter of adoption will be scrutinized by the courts with great strictness. The highest degree of fairness is required. In this case no complaint can be made as to the fairness of the transaction. Not only did every stockholder and director and officer of the corporation, after it was formed, know that the property was conveyed to it upon the agreement that, when formed, it should assume and pay the indebtedness to which the property was subject, but each of them was a party to that agreement. After receiving the benefit of the previous engagement, and accepting and using the property in its business, knowing that, as part of the price of the property, the corporation was to pay the indebtedness, it can hardly be permitted now to deny its liability to pay it; and the same may be said as to the claim that, because plaintiff was a director, the agreement of the corporation, by its adoption of the previous arrangement with him, was not binding upon it. The rule that a contract between a director of a corporation and the corporation is voidable at the instance of the latter, or of its stockholders, cannot be applicable to a case where all interested in the corporation, its officers, directors, and stockholders, not only know of but consent to it, and where the property acquired by the corporation under the contract is kept and used by it, no one dissenting.

The evidence was sufficient to sustain a verdict for plaintiff, within the rules herein stated. Order affirmed.[84]

[84] Compare In re Northumberland Hotel Co., L. R. 33 Ch. D. 16 (1886); Howard v. Patent Ivory Co., L. R. 38 Ch. D. 156 (1888).

For a discussion of the liability of corporations on contracts made by promoters, see 19 Harv. Law Rev. 97.

Mitchell, J., in McArthur v. Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653 (1892): "The defendant, however, claims that the contract was void under the statute of frauds, because 'by its terms not to be

KELNER v. BAXTER et al.

(Common Pleas, 1866. L. R. 2 C. P. Cas. 174.)

At the trial before Erle, C. J., at the sittings in London after last Trinity term, the following facts appeared in evidence: The plaintiff was a wine merchant, and the proprietor of the Assembly Rooms at Gravesend. In August, 1865, it was proposed that a company should be formed for establishing a joint-stock hotel company at Gravesend, to be called the Gravesend Royal Alexandra Hotel Company, Limited, of which the following gentlemen were to be the directors, viz.: Mr. L. Calisher, Mr. T. H. Edmands, Mr. M. Davis, Mr. Macdonald, Mr. Hulse, Mr. N. J. Calisher (one of the defendants), and the plaintiff. The plaintiff was to be manager of the proposed company, and Mr. Dales (another of the defendants) was to be the permanent architect. One part of the scheme was that the company should purchase the premises of the plaintiff for a sum of £5000 of which £3000 was to be paid in cash, and £2000 in paid-up shares, the stock, etc., to be taken at a valuation; and this was carried into effect and completed, the other defendant (Baxter) being the nominal purchaser on behalf of the company. In December a prospectus was settled. On the 9th of January, 1866, a memorandum of association was executed by the plaintiff and the defendants and others.

Pending the negotiations the business had been carried on by the plaintiff, and for that purpose additional stock had been purchased by him; and on the 27th of January, 1866, an agreement was entered

performed within one year from the making thereof,' which counsel assumes to be September 12th, the date of the agreement between plaintiff and the promoter. This proceeds upon the erroneous theory that the act of the corporation, in such cases, is a ratification, which relates back to the date of the contract with the promoter, under the familiar maxim that 'a subsequent ratification has a retroactive effect, and is equivalent to a prior command.' But the liability of the corporation, under such circumstances, does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company. Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed 'ratification,' yet a 'ratification,' properly so called, implies an existing person on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. In re Empress Engineering Co., 16 Ch. Div. 125 (1880); Melhado v. Porto Alegre, N. H. & B. Ry. Co., L. R. 9 C. P. 503 (1874); Kelner v. Baxter, L. R. 2 C. P. 174 (1866). What is called 'adoption,' in such cases, is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date. The contract in this case was, therefore, not within the statute of frauds. The trial court fairly submitted to the jury all the issues of fact in this case, accompanied by instructions as to the law which were exactly in the line of the views we have expressed, and the evidence justified the verdict."

into for the transfer of this additional stock to the company, in the following terms:

"January 27th, 1866.

"To John Dacier Baxter, Nathan Jacob Calisher, and John Dales, on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited—Gentlemen: I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule hereto, for the sum of £900, payable on the 28th of February, 1866.

"[Signed] John Kelner."

Then followed a schedule of the stock of wines, etc., to be purchased, and at the end was written as follows:

"To Mr. John Kelner—Sir: We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed. [Signed] J. D. Baxter,

"N. J. Calisher,

"J. Dales,

"On Behalf of the Gravesend Royal Alexandra Hotel Company, Limited."

In pursuance of this agreement the goods in question were handed over to the company, and consumed by them in the business of the hotel; and on the 1st of February a meeting of the directors took place, at which the following resolution was passed: "That the arrangement entered into by Messrs. Calisher, Dales, and Baxter, on behalf of the company, for the purchase of the additional stock on the premises, as per list taken by Mr. Bright, the secretary, and pointed out by Mr. Kelner, amounting to £900 be, and the same is hereby ratified." There was also a subsequent ratification by the company, viz. on the 11th day of April, but this was after the commencement of the action.

The articles of association of the company were duly stamped on the 13th of February, and on the 20th the company obtained a certificate of incorporation under the 25 & 26 Vict. c. 89.

The company having collapsed, the present action was brought against the defendants upon the agreement of the 27th of January.

On the part of the defendants oral evidence was tendered for the purpose of showing that it never was intended that they should be personally liable; but his Lordship rejected it. It was then submitted that, inasmuch as the agreement was not entered into by the defendants personally, but only as agents for the hotel company, they thereby incurred no personal obligation to the plaintiff, who was himself one of the promoters.

For the plaintiff it was insisted that, there being no company in existence at the time of the agreement, the parties thereto had rendered themselves personally liable; and that there could be no ratification of the contract by a subsequently created company.

A verdict was taken for the plaintiff for £900, subject to leave re-

served to the defendants (upon giving security) to move to enter a nonsuit, on the ground that the agreement of the 27th of January did not make them personally liable.[55]

ERLE, C. J. I am of opinion that this rule should be discharged. The action is for the price of goods sold and delivered: and the question is whether the goods were delivered to the defendants under a contract of sale. The alleged contract is in writing, and commences with a proposal addressed to the defendants, in these words: "I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule hereto, for the sum of £900, payable on the 28th of February, 1866." Nothing can be more distinct than this as a vendor proposing to sell. It is signed by the plaintiff, and is followed by a schedule of the stock to be purchased. Then comes the other part of the agreement, signed by the defendants, in these words: "Sir, We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed." If it had rested there, no one could doubt that there was a distinct proposal by the vendor to sell, accepted by the purchasers. A difficulty has arisen because the plaintiff has at the head of the paper addressed it to the plaintiffs, "on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited," and the defendants have repeated those words after their signatures to the document; and the question is, whether this constitutes any ambiguity on the face of the agreement, or prevents the defendants from being bound by it. I agree that if the Gravesend Royal Alexandra Hotel Company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally.

The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and

[55] The pleadings have been omitted.

the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made. The history of this company makes this construction to my mind perfectly clear. It was no doubt the notion of all the parties that success was certain: but the plaintiff parted with his stock upon the faith of the defendants' engagement that the price agreed on should be paid on the day named. It cannot be supposed that he for a moment contemplated that the payment was to be contingent on the formation of the company by the 28th of February. The paper expresses in terms a contract to buy. And it is a cardinal rule that no oral evidence shall be admitted to show an intention different from that which appears on the face of the writing.

I come, therefore, to the conclusion that the defendants, having no principal who was bound originally, or who could become so by a subsequent ratification, were themselves bound, and that the oral evidence offered is not admissible to contradict the written contract.

WILLES, J. I am of the same opinion. Evidence was clearly inadmissible to show that the parties contemplated that the liability on this contract should rest upon the company and not upon the persons contracting on behalf of the proposed company. The utmost it could amount to is, that both parties were satisfied at the time that all would go smoothly, and consequently that no liability would ensue to the defendants. The contract is, in substance, this, "I, the plaintiff, agree to sell to you, the defendants, on behalf of the Gravesend Royal Alexandra Hotel Company, my stock of wines;" and, "We, the defendants, have received your offer and agree to and accept the terms proposed, and you shall be paid on the 28th of February next." Who is to pay? The company, if it should be formed. But, if the company should not be formed, who is to pay? That is tested by the fact of the immediate delivery of the subject of sale. If payment was not made by the company, it must, if by anybody, be by the defendants. That brings one to consider whether the company could be legally liable. I apprehend the company could only become liable upon a new contract. It would require the assent of the plaintiff to discharge the defendants. Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done—by a person in existence either actually or in contemplation of law; as in the case of assignees of bankrupts and administrators, whose title, for the protection of the estate, vests by relation. The case of an executor requires no such ratification, inasmuch as he takes from the will. It is unnecessary, however, to pursue this further. In addition to the cases cited at the bar, I would refer to Gunn v. London and Lancashire Fire Insurance Company, 12 C. B. N. S. 694 (E. C. L. R. vol. 104),

Date of payment for Co. & Defendants

where this Court, upon the authority of Payne v. New South Wales Coal and International Steam Navigation Company, 10 Ex. 283, 24 L. J. Ex. 117, held that a contract made between the projector and the directors of a joint-stock company provisionally registered, but not in terms made conditional on the completion of the company, was not binding upon the subsequent completely registered company, although ratified and confirmed by the deed of settlement: and Williams, J., said that, "to make a contract valid, there must be parties existing at the time who are capable of contracting." That is an authority of extreme importance upon this point; and, if ever there could be a ratification, it was in that case.

Both upon principle and upon authority, therefore, it seems to me that the company never could be liable upon this contract: and, as was put by my Lord, construing this document ut res magis valeat quam pereat, we must assume that the parties contemplated that the persons signing it would be personally liable. Putting in the words "on behalf of the Gravesend Royal Alexandra Hotel Company" would operate no more than if a person should contract for a quantity of corn "on behalf of my horses." As to the suggestion that there should have been a special count, that is quite a mistake. There need not be a special count unless there was a person existing at the time the contract was made who might have been principal. The common count perfectly well represents the character of the liability which these defendants incurred. It is quite out of the question to suppose that there was any mistake. The document represents the real transaction between the parties. I think that the course taken at the trial was perfectly correct, and that the rule should be discharged.

Rule discharged.[56]

In re ENGLISH & COLONIAL PRODUCE CO., Limited.

(Court of Appeal, 1906, 2 Ch. Div. 435.)

This was a summons taken out in the winding-up of the English and Colonial Produce Company, Limited (below called the Produce Company), by Messrs. Dyson, Smith & Marchant, solicitors, to review the taxation of a bill of costs delivered by them to that company.

A company named "The English and Colonial Forage Company, Limited" (below called the Forage Company), passed special resolutions for winding-up voluntarily and authorizing its liquidator to enter into an agreement with a new company (the Produce Company) for the sale of its assets on certain terms, one of which was that the

[56] The concurring opinions of Byles and Keating, JJ., have been omitted.

Produce Company should take over the liabilities of the Forage Company.

The solicitors alleged that the Forage Company, before going into liquidation, instructed them to do what was necessary to form the Produce Company.

On November 2, 1901, according to a minute in a book of the Produce Company, a meeting of the following persons was held, namely, Messrs. Church, Sutton, Meyer, Porritt, and Sternberg, at which the memorandum and articles of association were read, and it was resolved that the solicitors of the company be instructed to forthwith register the company.

These five persons did in fact on November 2, 1901, sign the memorandum and articles of the Produce Company, and a member of the firm of solicitors attested their signatures.

On November 9, 1901, the solicitors registered the company, and paid to the Registrar of Joint Stock Companies the registration fees, amounting to £33 2s. 6d. The company was formed to acquire the undertaking of the Forage Company, and also the business of Messrs. Meyer & Porritt.

Clause 109 of the articles of association of the Produce Company provided as follows: "The business of the company shall be managed by the directors, who may pay all such expenses of and preliminary and incidental to the promotion, formation, establishment and registration of the company as they think fit."

In July, 1902, an order was made for the winding-up of the Produce Company, and, in accordance with the directions of Kekewich, J., in an action by the company against the solicitors, the solicitors lodged certain bills of costs in the winding-up proceedings. The bill of costs now in question was taxed by Mr. Registrar Hood, who disallowed items, amounting to £216 14s. 6d., covering counsel fees, filing and printing fees, incident to the formation of the Produce Company.

The solicitors in their objection to the taxation said that the Forage Company originally instructed them to do what was requisite to form the Produce Company which was to acquire its assets, and they relied on the minute of November 2, 1901, as showing that the persons who subsequently became directors confirmed the instructions of the Forage Company. They also relied on the agreement of the Produce Company to pay the debts of the Forage Company, and on clause 109 of the articles of association of the Produce Company.

The registrar disallowed the objection on the following grounds: "The costs in question appear to have been authorized by certain persons who afterwards joined the board of the company; but though the company had power to pay, they never took any steps to pass any resolution to that effect. The company are therefore not liable to pay the costs of the registration of the company."

The solicitors thereupon took out a summons to review the taxa-

tion in respect of the disallowance of the items amounting to £216 14s. 6d.[57]

The summons was heard before Buckley, J., on May 30, 1906.

BUCKLEY, J. I have to review the taxation by the registrar in companies winding-up of a bill of costs in respect of certain items, amounting in the aggregate to £216 14s. 6d., which have been disallowed by him. I will deal first with two items of £160 and £16 10s., which are, shortly stated, for work relating to the formation of a company and to the preparation of its memorandum and articles of association. As appears by the bill, there were attendances on Messrs. Church, Sutton, Porritt, and Meyer as to forming a new company to take over the business of the Forage Company and of Messrs. Meyer & Porritt, and instructions were given for the memorandum and articles for the incorporation of the new company. The persons giving those instructions were prima facie the persons I have named. The solicitors in their objections state that the Forage Company prior to going into voluntary liquidation originally instructed the solicitors to do what was requisite to form the Produce Company to acquire the assets, and that in pursuance of such instructions they did all things necessary before the resolution for the voluntary winding-up of the Forage Company was passed. The first entry in the minute-book of the Produce Company is the minute of a meeting on November 2, 1901, of the four persons mentioned in the bill and a Mr. Sternberg, and at that meeting the memorandum and articles of association were read and signed, and it was resolved "that the solicitors of the company be instructed to forthwith register the company." The Produce Company was incorporated on November 9, 1901, and its memorandum and articles were then filed with the Registrar of Joint Stock Companies. Therefore the liability for the work done by the solicitors had already been incurred before the incorporation of the Produce Company.

Under these circumstances the question arises, who retained the solicitors, and did the solicitors do the work intending to look for payment to the Produce Company, when incorporated, or to the gentlemen I have mentioned? The registrar finds as a fact, and in my judgment rightly, that these gentlemen retained the solicitors. The Produce Company, after it was incorporated, took the benefit of the work done by the solicitors. Is the company rendered liable by that fact to pay for the work done? The doctrine which is applicable is to be found in the judgment of Fry, L. J., in In re Rotherham Alum and Chemical Co., [1883] 25 Ch. D. 103, 111. The Lord Justice says: "The appellant rests his case on two grounds. One is that where a person takes property on which labour has been expended and gets the benefit of that labour he must pay for it. As pointed out by Lord Justice Lindley, that is by no means universally true.

[57] Statement of facts abridged.

It is not true where the work was done for the vendor of the property, and that was the case here, these costs having been incurred on the retainer of Mycock." That statement mutatis mutandis, applies here. I hold that the case is governed by In re Rotherham Alum and Chemical Co. (1883) 25 Ch. D. 103, 111, and that the company was not liable for the costs incurred in respect of its promotion.

The fee of £33 12s. 6d. paid by the solicitors to the Registrar of Joint Stock Companies on registering the company stands upon a different footing. By section 17 of the Companies Act, 1862, the memorandum and articles are to be delivered to the Registrar of Joint Stock Companies, and "there shall be paid to the registrar by a company having a capital divided into shares"—and the Produce Company was such a Company—certain fees. Under that section and a subsequent Act of Parliament the company became liable to pay the fees on its registration amounting to £33 12s. 6d. The solicitors paid that sum, which the company was under a statutory liability to pay to the revenue authorities, and the solicitors were in my judgment entitled to charge the company in respect of this item.[58] As to the other claims which the registrar has disallowed, it was for the solicitors to make out that they were entitled to make the charges, and they have failed to do so. In respect of the first item, the charge of £160, the solicitors have craved in aid clause 109 of the articles of association. But that clause is really inconsistent with the suggestion that the company was liable for all the expenses of the formation, establishment, and registration of the company. The result is that the certificate of the registrar is varied to this extent, that the fee of £33 12s. 6d. is allowed, and that his decision as to the other items is affirmed, and I make no order as to the costs.

THE COURT, being of opinion that the solicitors had been instructed by Messrs. Church, Sutton, Porritt and Meyer, held that the company was not liable for the items in dispute; but, it appearing that the company had already paid the solicitors £100 for work done in connection with its formation, they held that the solicitors were entitled to appropriate that payment to those items, and referred the taxation back to the registrar to review on this footing; and they made no order as to the costs of the appeal.

VAUGHAN WILLIAMS, L. J. I wish to say one word about the proposition which was put forward by Mr. Gore-Browne, and for which he cited a passage from the judgment of Mellish, L. J., in Re Hereford and South Wales Waggon and Engineering Co., 2 Ch. D. 621, 624. Mellish, L. J., was there delivering the judgment of

[58] No appeal was taken by the liquidators from the decision in favor of the solicitors on this point. The judgment as to this point was, however, overruled in the case of In re National Motor Mail Coach Company, Limited, [1908] 2 Ch. Div. 515.
Compare: Tilson v. Warwick Gaslight Co., 4 B. & C. 962 (1825).

the Court of Appeal, consisting of himself, James, L. J., and Baggallay, J. A. It is said that that case is an authority for the proposition that if expenses are incurred before the formation of a company which afterwards comes into existence, and the company takes the benefit of the work in respect of which those expenses arose, although the company could not be sued at law for those expenses, inasmuch as it was not in existence at the time when the expenses were incurred, and was therefore unable to authorize agents to act for it and ratification was impossible, yet it was under some liability in equity.

That passage is as follows: "We think, however, that if the company can properly be considered to have adopted and derived benefit from these services, they would in equity be bound to pay for them." Those words do look as if they would cover the proposition that the adoption and taking the benefit of the services by the new company would make the company liable in equity before it came into existence. I do not, however, think that that is the right way to look at the judgment. It was a case in which, even supposing there was authority for asserting that proposition, there was, by reason of the fraudulent concealment of the claimants, a complete answer to the claim based on that liability. I think that all the Court did in that case was not to decide that there was such liability in equity, there being no liability in law, but merely to say that even on that assumption there was no liability under the circumstances of that case. Still I recognize that that case has been cited several times since as an authority for the proposition I have mentioned. It cannot be said, however, that that proposition has ever been affirmed in the subsequent cases on this subject. The dictum has been explained and not applied in the subsequent cases, and the explanation in each case was a different one.

If the cases of In re Empress Engineering Co., 16 Ch. D. 125, and In re Rotherham Alum and Chemical Co., 25 Ch. D. 103, are looked at, it will be seen that, though the argument which has been addressed to us here was advanced in each of those cases, it was not adopted by the Court. In these circumstances I think we were all prepared to hold that there is no binding authority for the proposition that a company, because it has taken the benefit of work done under a contract entered into before the formation of the company, can be made liable in equity under that contract. On the contrary, it seems to me that the authorities are the other way. Perhaps it is sufficient for me to say this, because on the facts of the present case we have not to decide the question of the judgment in In re Hereford and South Wales Waggon and Engineering Co., 2 Ch. D. 621, 624. But it was so pressed upon us that this case was cited in the text-books as an authority for the proposition in question that I thought it right to say, although it is merely an obiter expression of

opinion, that I do not myself think that case is any authority for that proposition.

ROMER, L. J. I also think it right to state my views on this point. In my opinion, with respect to a solicitor's claim for costs for work done by him in relation to the formation of a company which is subsequently formed, in order to substantiate a claim against the new company for his costs as solicitor he must establish a legal claim against the company either on his own behalf or on behalf of some person or persons in whose shoes he is entitled to stand. If he cannot do that he cannot succeed, in my opinion, in establishing a claim on what are called equitable grounds. The idea that a company merely because it has obtained the advantage of the solicitor's work done before the formation of the company is liable in equity for the costs of that work appears to me to be wholly untenable. In my opinion there is no such equity, and any claim based upon it ought to fail.

FLETCHER MOULTON, L. J. My decision is based on the special facts of this case and I do not consider that any point of law is involved. I wish however to say that I reserve my decision as to the liability of a company in respect of the necessary costs of the legal steps in the course of its formation, although I quite agree that there is no binding decision that the company is liable to pay such costs. I also agree with my brothers in thinking that there is no general equitable principle that because you have got the benefit of a man's work therefore you are liable to pay for it. Stated so broadly, that proposition is, in my opinion, absolutely incapable of being supported.

WEATHERFORD, M. W. & N. W. RY. CO. v. GRANGER.

(Supreme Court of Texas, 1894. 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837.)

Action by Francis Granger against the Weatherford, Mineral Wells & Northwestern Railroad Company for services rendered in procuring a bonus. A judgment for plaintiff was affirmed at the court of civil appeals, (23 S. W. 425,) and defendant brings error.

GAINES, J. This suit was brought by the defendant in error against the plaintiff in error to recover upon open account for services rendered. The plaintiff in the trial court obtained a judgment which was affirmed by the court of civil appeals. This writ of error is sued out for the purpose of reversing that judgment.

The plaintiff in error, the defendant in the trial court, is a corporation organized under the general law of the state for the purpose of constructing and operating a railroad. The defendant in error, the plaintiff in the trial court, is a practicing attorney at law. The serv-

ices for which a recovery was sought were for aiding to raise a bonus, and for legal advice and assistance, and were rendered both before and after the filing with the secretary of state of the company's articles of incorporation.

The testimony, as shown by the statement of facts, in so far as it bears upon the question before the court, is, in substance, as follows:

The plaintiff testified that in March, 1889, he was employed by one Anderson to assist in raising a bonus for the defendant company, and "agreed that the said company would pay him well for his services;" that Anderson was a promoter of the corporation, and represented himself as its general manager, and employed plaintiff not only to assist in procuring the bonus, but to attend to all the company's business as its attorney; that in September, 1889, Anderson allowed his account, and was at that time the owner of a majority of the stock, which he subsequently transferred to one Stone, the president of the company, and his associates.

Stone testified, on behalf of the company, that in the spring of 1889, in Kansas City, Mo., he employed Anderson to go to Weatherford and to procure a bonus of $40,000, and survey the right of way for a railroad from that city to Mineral Wells, and to pay him $1,000 for his services; that he had paid Anderson according to his agreement; that he did not know that Anderson had ever employed plaintiff for any purpose; that Anderson was never general manager for the company, and held no office in it except that of director; that he knew that the plaintiff was interesting himself in procuring the bonus, but supposed that he was working for one Johnson, who was one of the charter members, and who owned certain coal lands which he wished to sell to the projectors of the railroad; that plaintiff never said anything to him about the company owing him anything, and that the first he knew of plaintiff's claim was when this suit was brought.

There was further testimony, tending to show that Anderson was the chief active promoter of the enterprise, and that he had the principal management of the business from its inception, in March, until he retired in September, 1889; and that during this time the plaintiff was frequently in attendance upon him, aiding and assisting him in procuring the bonus, and otherwise promoting the objects of the company. No controversy is raised in this court as to the fact of plaintiff's services, or as to their value.

The trial judge, as conclusions of fact, found, in substance, that some kind of a company was formed to build the railroad from Weatherford to Mineral Wells; that Anderson was the "principal mover in said scheme, and was so recognized by all parties;" that he employed plaintiff to insist him in procuring a bonus and in otherwise advancing the enterprise, and that the plaintiff rendered services under said employment both before and after the articles of the

company were filed; that the bonus was raised, and was, after its incorporation, accepted by said company.

The court of civil appeals adopt the findings of the trial judge, and additional findings as follows: "The charter of the defendant company was signed and acknowledged about June 1, 1889, and was filed in the office of the secretary of state at Austin July 2, 1889. The bonus or subsidy was not secured until after the filing of the charter. The record would have justified the trial court, and so justifies us, in finding, as we do, the fact to be that in availing itself of the subsidy secured the company knew of the services of the plaintiff in raising the bonus."

Under the statute, the corporation came into existence when its articles of incorporation were filed in the office of the secretary of state. Rev. St. arts. 4104, 4105. Although the trial court found that the services for which plaintiff sued were rendered in part before and in part after the filing of the articles, their value was assessed as an entirety at $500, and judgment was rendered for the whole amount. In this there was error. We are of opinion that, under the circumstances of this case as shown by the evidence, the defendant corporation cannot be held liable to the plaintiff for any services rendered by him before it was brought into legal existence.

Upon the question as to the liability of a corporation growing out of contracts made on its behalf by its promoters there is considerable diversity and some conflict of opinion. But there are some propositions affecting this question upon which the authorities seem to be in substantial accord. A promoter, though he purport to act on behalf of the projected corporation, and not for himself, cannot be treated as agent, because the nominal principal is not then in existence; and hence, where there is nothing more than a contract by a promoter, in which he undertakes to bind the future corporation, it is generally conceded that it cannot be enforced. Kelner v. Baxter, L. R. 2 C. P. 174; Melhado v. Railway Co., L. R. 9 C. P. 503.

The promoters themselves are liable upon the contract, unless the person with whom they engage agrees to look to some other fund for payment. Kerridge v. Hesse, 9 Car. & P. 200. The statute, however, which authorizes the incorporation, may provide that the corporation, when formed, shall pay the necessary expenses of promoting the scheme. In such a case, though the right of action is dependent upon the contract, the liability is created by the statute. In re Rotherham, etc., Co., 50 Law T. (N. S.) 219.

It is now held in England that, although the articles of association bind the company to pay the expenses of its promotion, a third party cannot avail himself of such a provision so as to maintain an action against the company. In re Rotherham, etc., Co., supra; Ely v. Assurance Co., 34 Law T. (N. S.) 190. It is also generally held that contracts by promoters, made on behalf of the corporation

within the scope of its general authority, may be adopted by the latter after its organization. Some of the courts say they may be ratified, but ratification presupposes a principal existing at the time of the agent's action, and it seems to us, therefore, that the term is not applicable in its technical sense. McArthur v. Printing Co. (Minn.) 51 N. W. 216; Spiller v. Skating Rink Co., 7 Ch. Div. 368.

With the exception of the law courts of England, the rule is also very generally recognized that if a contract be made on behalf of a corporation by its promoters, and the corporation, after its organization, with a knowledge of the facts, accept its benefits, it must take it with its burdens; and, if the other party has performed the stipulation binding upon him, it may be enforced as against the corporation. Spiller v. Skating Rink Co., supra; Tuche v. Warehousing Co., 6 Ch. App. 67.

But as to the application of the rule last announced the courts differ in opinion. A leading case upon this subject is Edwards v. Railway Co., 1 Mylne & C. 650. There the promoters of the railway company had entered into a contract with the trustees of a turnpike company, in which the latter agreed to withdraw their opposition to an act of parliament for the incorporation of the railway company, in consideration of an agreement by the promoters to insert certain clauses in the act as to the nature of the necessary constructions at the crossing of the railway and the turnpike road, and the opposition was withdrawn, but the clauses were not inserted; and it was held that the railway company should be enjoined from constructing the crossing in a manner different from that specified in the clauses which had been agreed upon and had been omitted. The correctness of the ruling in this case was seriously questioned in the house of lords in Preston v. Railway Co., 5 H. L. Cas. 605, and in Railway Co. v. Magistrates of Helensburgh, 2 Macq. 391, 2 Jur. (N. S.) 695. We presume the doubt as to this case arises from the fact that the only benefit accepted by the defendant company was the exercise of the powers conferred upon it by the act of parliament.

Where the promoters of a railway company have agreed with a landed proprietor, through whose estates the road is projected to run, to take the requisite quantity of his land at a stipulated price, and after the corporation is formed it takes the land, it is certainly equitable that the company should be made to pay the agreed compensation; and the doctrine is recognized in many English equity cases. Stanley v. Railway Co., 3 Mylne & C. 773; Gooday v. Railway Co., 15 Eng. Law & Eq. 596; Preston v. Railway Co., 7 Eng. Law & Eq. 124; Edwards v. Railway Co., 1 Mylne & C. 650. The same rule has been announced also in many American cases. Railway Co. v. Perry, 37 Ark. 164; Paxton Cattle Co. v. First Nat. Bank, 21 Neb. 621, 33 N. W. 271; Manufacturing Co. v. Small, 40

Md. 395; Bommer v. Spring, etc., Co., 81 N. Y. 468; Battelle v. Pavement Co., 37 Minn. 89, 33 N. W. 327; McArthur v. Printing Co., supra.

Having exercised rights and enjoyed benefits secured to it by the terms of a contract made by its promoters in its behalf, a corporation should be held estopped to deny its validity. Again, where the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on part of the other party to the agreement, unless withdrawn by him, and may be accepted and adopted by the corporation after such organization; and the exercise of any right inconsistent with the nonexistence of such contract ought to be deemed conclusive evidence of such adoption.

But there are some cases which go a step further. Low v. Railroad Co., 45 N. H. 370, was a case of a Vermont corporation sued in New Hampshire upon a contract made in the former state. After a charter had been granted, but before an organization had been effected, a public meeting was held to promote the enterprise, at which, it is to be presumed from the opinion, the corporators were present or were represented. A proposition was made that the plaintiff should be employed, and paid to visit various towns and cities to interest capital in the projected scheme, and to solicit and procure subscriptions. The plaintiff accepted the offer, and performed the services; and it was held that the corporation was liable. The court determined that the question of liability depended upon the law of Vermont as announced in the case of Hall v. Railway Co., 28 Vt. 401. But they were also inclined strongly to think that upon general principles the company, by accepting subscriptions, which were procured by the plaintiff, bound itself to pay for his services. They also seem to recognize the doctrine that after a charter has been granted a majority of the corporators have the power to make contracts necessary to perfect the organization, which may be binding upon the company when formed. But they also lay stress upon the fact that the charter of the defendant corporation provided that "the expenses of all surveys and examinations, as also of the preliminary surveys already made and making, and all manner of incidental expenses relating thereto, shall be paid by said corporation."

In Hall v. Railway Co., supra, a corporator was held entitled to recover for necessary services in organizing the company, although there was no express promise by any one that he should be paid. Unless the charter of the company provided for the payment of such expenses, this decision, we think, is unsupported by authority.

It is generally held that, in the absence of such provision in the act of incorporation in case of a special charter, or in the general law, or in the articles of incorporation under a general law, no

implied promise can be imputed to a corporation to pay for the services of a corporator or promoter before the corporation comes into existence. A contract made by promoters may be adopted by a corporation expressly or impliedly by exercising rights under it; but otherwise it is not binding upon such corporations. Kelner v. Baxter, supra; Melhado v. Railway Co., supra; Railway Co. v. Ketchum, 27 Conn. 170; Kerridge v. Hesse, 9 Car. & P. 200; Munson v. Railroad Co., 103 N. Y. 58, 8 N. E. 355; Morrison v. Mining Co., 52 Cal. 306; Gent v. Insurance Co., 107 Ill. 652; Railway Co. v. Sage, 65 Ill. 328; Manufacturing Co. v. Cousley, 72 Ill. 531; Buffington v. Bardon, 80 Wis. 635, 50 N. W. 776. See, also, Railway Co. v. Magistrates of Helensburgh, 2 Macq. 391, 2 Jur. (N. S.) 695; Tift v. Bank, 141 Pa. 550, 21 Atl. 660.

Now, when it is said that when a corporation accepts the benefit of a contract made by its promoters it takes it cum onere, it is important to understand distinctly what is meant. There is, so far as this matter is concerned, a radical difference between a promise made on behalf of the future corporation in the contract itself, the benefits of which the corporation has accepted, and the promise in a previous contract to pay for services in procuring the latter to be made. This is well illustrated by the facts of the present case. Here a proposition was made on behalf of the company, by its promoters, that if a bonus should be subscribed and paid to it, it would build its road between certain points, and would carry coal at a certain stipulated rate. By accepting the bonus, the company became bound to fulfill the stipulations of that contract. That was the burden which it took with the benefit of the agreement. But it also appears that one of the promoters promised the plaintiff that if he would assist in procuring subscribers to the bonus the company would pay him for his services. This was no part of the contract the benefits of which were taken by the defendant.

The benefits of a contract are the advantages which result to either party from a performance by the other, and in like manner its burdens are such as its terms impose. A more accurate manner of stating the nature of the plaintiff's demand is to say that the defendant has accepted the benefit of the plaintiff's services, and should pay for them. It is true in one sense that the company has had the benefit of plaintiff's services, and it is equally true that it would have had that benefit if the services had been rendered under an employment by the subscribers to the bonus; and yet in the latter case it could not be claimed that the company would be liable for such services unless payment for them by the company were made one of the terms of the contract between the company and the subscribers.

In Re Rotherham, etc., Co., 50 Law T. (N. S.) 219, in the opinion of one of the justices, this language is used: "It is said that Mr. Peace has an equity against the company because the company had

the benefit of his labor. What does that mean? If I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer, but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done by somebody else he is liable to pay the person who did the work."

There is more doubt as to the plaintiff's right to recover for his legal services in advising as to the articles of incorporation, and in correcting and preparing this paper. Such services are usually necessary, and it would seem that the corporation should pay for them. Such payment is frequently provided for in the act of incorporation or in the articles when the incorporation is effected under a general law. When such is the case, persons who take stock in the company are chargeable with notice that a liability for this purpose has already been created, and it is proper for the corporation to discharge it. But, in the absence of such provision in the statute or in the articles, it may be unjust to shareholders to charge the corporation with liabilities of which they had no actual knowledge at the time they accepted the shares. We therefore hold with some hesitation that claims for the necessary expenses of the organization under our statute should not be excepted from the general rule applicable to contracts made before the corporation has come into legal existence.

Applying the rules we have announced to the case before us, it is apparent that the plaintiff has recovered, in part at least, for services for which the defendant was not bound to pay. He made his contract before the company had a legal existence as a corporation, with a single promoter; and it is a matter of no moment that the promoter was the general manager of the project, and became the owner of the majority of the stock upon its organization. There were other stockholders. The law requires that there should be 10 at least. Rev. St. art. 4099.

The evidence does not disclose that his contract with Anderson was actually known to any other person, nor do we see any other circumstance from which knowledge should necessarily be inferred. Since Anderson had no power to bind the future corporation, but could bind himself, the inference from his assisting Anderson would be that he was acting gratuitously, or that Anderson had agreed to pay him. Anderson was interested in shifting his contract upon the company, and it may be doubted whether, although he became a director, notice to him could be deemed notice to the company. The court of civil appeals find, however, that the company had notice.

Waiving the question of the right of the court to supplement the finding of the trial judge under such evidence, and the further question whether there be any evidence to support this conclusion, it follows from what we have already said that the question of the company's knowledge does not affect the case. The plaintiff's contract

with Anderson, though made by latter on behalf of the company, was not a lien, incumbrance, or burden upon the contract between the subscribers to the bonus and the defendant, and it incurred no liability on the former contract by accepting the benefit of the latter. The evidence was sufficient to sustain a recovery by plaintiff for the value of his services rendered after the corporation was created; but the court below failed to find separately the reasonable worth of such services. Therefore the entire judgment must be reversed.

We deem it proper to say in conclusion that if the opinion in the case of McDonough v. Bank, 34 Tex. 309, is to be construed as holding that by merely accepting the benefit of the plaintiff's labor the defendant ratified and became bound under the promoter's contract, it does not meet our approval. Whether the contract in that case was one which the bank had the power to ratify is, to say the least, a doubtful question; but it is one that does not concern us here, and upon which we express no opinion. The judgments of the district court and of the court of civil appeals are reversed, and the cause remanded.

FARMERS' BANK OF VINE GROVE v. SMITH.

(Court of Appeals of Kentucky, 1899. 105 Ky. 816, 49 S. W. 810, 88 Am. St. Rep. 341.)

Action by H. H. Smith against the Farmers' Bank of Vine Grove to recover for services rendered. Judgment for plaintiff, and defendant appeals.

WHITE, J. The appellee by this action sought to recover of appellant the sum of $500 for services rendered in organizing the bank, securing and soliciting stock, superintending the work of building, writing the articles of corporation, and various services, before, and some after, the date it commenced business. The answer is a denial of any contract, either expressed or implied, or any liability to pay, a denial of the value, and an allegation that the services were rendered gratuitously by appellee. The case was tried before a jury, and resulted in a verdict and judgment for appellee in the sum of $350. After reasons and motion for new trial had been overruled, this appeal is prosecuted. The reasons for a new trial are: The error of the court in refusing to give a peremptory instruction; permitting incompetent evidence to go to the jury, over its objection; error in giving instructions 1 to 7, inclusive, and in refusing others (1 to 4) asked for; error in modifying instruction 7, and in refusing to give same as asked; that the verdict is flagrantly against the evidence; that the pleadings do not warrant the judgment.

From the proof introduced as to the amount and value of the services rendered, there can scarcely be a question as to the amount found

by the jury, if, as a matter of law, appellee has shown himself entitled to recover any sum. Appellee actively, and almost exclusively, secured all the stock to be taken. He made trips to Hodgenville, Louisville, and Frankfort in the interest of the corporation, superintended the construction of the banking house, let out contracts, negotiated the purchase of the lot on which was erected the banking house, drew the articles of incorporation, and, after the bank began work, gave its officers such advice as they sought. The verdict of $350 is not unreasonable.

The question of gratuity was submitted to the jury on conflicting evidence, and it cannot be said their verdict is flagrantly against the evidence; and, unless it be so, it will not be disturbed. It is earnestly contended that appellee cannot recover any sum for this service, although it was rendered, and was beneficial and accepted by the appellant, for the reason that he had no contract, and because there was no corporation to make a contract with, and any agreement made by any person before the organization would not bind the corporation, for the reason that it was ultra vires as to the corporation. We do not assent to this doctrine. We are of opinion that a corporation is, by an implied contract, liable for such or any services rendered for the use of the corporation as are necessary to its formation, or may be necessary to be done by it, after its incorporation, in furtherance of its corporate business.

The case of Low v. Railroad Co., 45 N. H. 370, 377, is directly in point, and has been approved by this court. It says: "It may then be safely assumed that under the laws of Vermont the corporation is liable in some form for services necessary to perfect its organization, and which, when such organization was perfected, it accepted, and enjoyed the benefits arising therefrom. Such would be the case in respect to services in obtaining subscriptions to the capital stock, rendered by a corporator or associate, and which subscriptions were, after the organization, accepted by the corporation. Of course, to entitle the plaintiff to recover, such services must have been necessary and reasonable, and rendered, not gratuitously, but with the understanding and expectation that they were to be paid for." This case, supra, was expressly approved by the supreme court of Pennsylvania (Railroad Co. v. Cristy, 79 Pa. 54), the court holding: "It may very well be that, where a number of persons not incorporated are yet informally associated together in the pursuit of a common object, and with the intent to procure a charter in the furtherance of their design, they may authorize certain acts to be done by one or more of their number, with an understanding that compensation shall be made therefor by the company when fully formed. And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company, and the benefit thereof enjoyed by them, they must take such benefits cum onere, and make compensation

therefor." This principle was recognized in the case of Waddy Blue-Grass Creamery Co. v. Davis-Rankin Bldg. & Mfg. Co. (decided May 12, 1898) 103 Ky. 579, 45 S. W. 895, as well as Morton v. Hamilton College, 100 Ky. 281, 38 S. W. 1, 35 L. R. A. 275.

It seems to us that any other rule would render it difficult to organize any corporation, however necessary. No person would render the services, or pay another to do so, however essential it be to the organization, if there was no obligation to pay by the corporation after it is brought into existence. We are of opinion that appellee was entitled to recover for the services rendered and sued for, as they were necessary to the organization of the corporation.

We are referred to the case of Oldham v. Improvement Co. (decided May 3, 1898) 103 Ky. 529, 45 S. W. 779, as holding that the corporation cannot be made liable by the representations or acts of its promoters. The question in that case was the right of a subscriber for stock to defeat the collection of his unpaid subscription of stock by reason of false and fraudulent representations of a promoter as to the condition and prospects of the company. The court holds that the corporation is not bound by such representations, and a stockholder cannot be relieved by reason thereof. Any other expression of opinion was but dictum. This case is clearly distinguishable from the Oldham Case, supra. The charges here made are for necessaries for the organization of the corporation.

Appellant complains of the ruling of the court in admitting certain testimony of Young. The effect of this testimony is that witness was a stockholder and a preliminary director, and that he had no knowledge or information of any contract or agreement to pay appellee for his services, but that the witness expected such would be paid, as that was customary in organizing corporations. We do not think that the admission of this evidence is such error, if any, as alone would authorize a reversal. The instructions given the jury clearly state the law of the case, and are approved. Finding no error, the judgment is affirmed, with damages.[59]

[59] Compare: Low v. Railroad, 45 N. H. 370 (1864).

CHAPTER III

POWERS AND LIABILITIES

SECTION 1.—INTERPRETATION OF CHARTERS AND FRANCHISES

CHARLES RIVER BRIDGE v. WARREN BRIDGE.

(Supreme Court of the United States, 1837. 11 Pet. 420, 9 L. Ed. 773.)

This suit in chancery was commenced in the supreme court of Massachusetts, where the bill was dismissed by a decree, pro forma, the members of that court being equally divided in opinion; and a writ of error was taken to this court, on the ground that the right asserted by the complainants, and which has been violated under the charter of the respondents, is protected by a special provision in the federal constitution.

The complainants' right is founded on an act of the legislature of Massachusetts, passed March 9, 1785; which incorporated certain individuals, and authorized them to erect a bridge over Charles River, a navigable stream between Boston and Charlestown, and an amendatory act, passed in 1791, extending the charter 30 years.

As explanatory of this right, if not the ground on which it in part rests, a reference is made to an ancient ferry, over the same river, which was held by Harvard College; and the right of which was transferred, it is contended, in equity, if not in law, to the bridge company.

The wrong complained of consists in the construction of a new bridge over the same river, under a recent act of the legislature, within a few rods of the old one, and which takes away the entire profits of the old bridge.

The act to establish the Charles River Bridge required it to be constructed within a limited time, of certain dimensions, to be kept in repair, and to afford certain specified accommodations to the public. The company were authorized to charge certain rates of toll; and they were required to pay, annually, two hundred pounds to Harvard College. The first charter was granted for forty years.

The facts proved in the case show that a bridge of the description required by the act of 1785, was constructed within the time limited; that the annual payment has been made to the college; and that, in every other respect, the corporation has faithfully performed the conditions and duties enjoined on it.

It is contended that the charter granted to the respondents vio-

lates the obligations of that which had been previously granted to the complainants; and that, consequently, it is in conflict with that provision of the constitution which declares that no "State shall pass any law impairing the obligation of contracts." [1]

TANEY, C. J.[2] * * * Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the state, may be implied. The Court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, in the case of Proprietors of the Stourbridge Canal v. Wheely and Others, the court say: "The canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this; that any ambiguity in the terms of the contract, must operate against the adventurers, and in favour of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one, as could well be imagined, for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal, were expressly secured by the act of parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the locks," and had said nothing as to toll for navigating one of the levels; the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labours, and used the canal freely and extensively for their own profit. Still, the right to exact toll could not be implied, because such a privilege was not found in the charter.

[1] Statement of facts from opinion of McLean, J.

[2] A part of the opinion is omitted.

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there any thing in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the States, more unfavourable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction in favour of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavourably to the public, and to the rights of the community, than would be done in a like case in an English court of justice. * * *

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the State, that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used, from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant; and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been re-

voked by the legislature, and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain, and that they impaired, or, in other words, violated that contract by the erection of the Warren Bridge.

The inquiry then is, Does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none —no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this Court to the Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done. * * *

STORY, J.[a] * * * Before we can properly enter upon the consideration of this subject, a preliminary inquiry is presented as to the proper rules of interpretation applicable to the charter. Is the charter to receive a strict or a liberal construction? Are any implications to be made, beyond the express terms? And if so, to what extent are they justifiable by the principles of law? No one doubts, that the charter is a contract, and a grant; and that it is to receive such a construction as belong to contracts and grants, as contradistinguished from mere laws. But the argument has been pressed here, with unwonted earnestness; and it seems to have had an irresistible influ-

[a] A part of the opinion is omitted.

ence elsewhere; that this charter is to be construed as a royal grant, and that such grants are always construed with a stern and parsimonious strictness. Indeed, it seems tacitly conceded that unless such a strict construction is to prevail, (and it is insisted on as the positive dictate of the common law,) there is infinite danger to the defence assumed on behalf of the Warren Bridge proprietors. Under such circumstances, I feel myself constrained to go at large into the doctrine of the common law in respect to royal grants; because I cannot help thinking that upon this point very great errors of opinion have crept into the argument. A single isolated position seems to have been taken as a general axiom. In my own view of the case, I should not have attached so much importance to the inquiry. But it is now fit that it should be sifted to the bottom.

It is a well-known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails, in cases of grants by the king; for, where there is any doubt, the construction is made most favourably for the king, and against the grantee. The rule is not disputed. But it is a rule of very limited application. To what cases does it apply? To such cases only, where there is a real doubt, where the grant admits of two interpretations, one of which is more extensive, and the other more restricted; so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant. If the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail; for the reason, (says the common law,) "that it will be more for the benefit of the subject, and the honour of the king, which is to be more regarded than his profit." Com. Dig. Grant, G. 12; 9 Co. R. 131. a.; 10 Co. R. 67, b; 6 Co. R. 6. And in every case the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favour of the king. And, if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced. The rule itself is also expressly dispensed with, in all cases where the grant appears upon its face to flow, not from the solicitation of the subject, but from the special grace, certain knowledge, and mere motion of the crown; or, as it stands in the old royal patents, "ex speciali gratia, certa scientia, et ex mero motu regis." See Arthur Legate's Case, 10 Co. R. 109, 112, b.; Sir John Moulin's Case, 6 Co. R. 6; 2 Black. Comm. 347; Com. Dig. Grant, G. 12. And these words are accordingly inserted in most of the modern grants of the crown, in order to exclude any narrow construction of them. So the court admitted the doctrine to be in Attorney-General v. Lord Eardly, 8 Price, 69. But what is a most important qualification of the rule, it never did apply to grants made for a valuable consideration by the crown; for in such grants the same rule has always prevailed, as in

cases between subjects. The mere grant of a bounty of the king may properly be restricted to its obvious intent. But the contracts of the king for value are liberally expounded, that the dignity and justice of the government may never be jeoparded by petty evasions, and technical subtleties. * * *

If, then, the present were the case of a royal grant, I should most strenuously contend, both upon principle and authority, that it was to receive a liberal, and not a strict construction. I should so contend upon the plain intent of the charter, from its nature and objects, and from its burthens and duties. It is confessedly a case of contract, and not of bounty; a case of contract for a valuable consideration; for objects of public utility; to encourage enterprise; to advance the public convenience; and to secure a just remuneration for large outlays of private capital. What is there in such a grant of the crown, which should demand from any court of justice a narrow and strict interpretation of its terms? Where is the authority which contains such a doctrine, or justifies such a conclusion? Let it not be assumed, and then reasoned from, as an undisputed concession. If the common law carries in its bosom such a principle, it can be shown by some authorities, which ought to bind the judgment, even if they do not convince the understanding. In all my researches I have not been able to find any, whose reach does not fall far, very far short of establishing any such doctrine. Prerogative has never been wanting in pushing forward its own claims for indulgence, or exemption. But it has never yet (as far as I know) pushed them to this extravagance.

I stand upon the old law; upon law established more than three centuries ago, in cases contested with as much ability and learning, as any in the annals of our jurisprudence, in resisting any such encroachments upon the rights and liberties of the citizens, secured by public grants. I will not consent to shake their title deeds, by any speculative niceties or novelties.

The present, however, is not the case of a royal grant, but of a legislative grant, by a public statute. The rules of the common law in relation to royal grants have, therefore, in reality, nothing to do with the case. We are to give this act of incorporation a rational and fair construction, according to the general rules which govern in all cases of the exposition of public statutes. We are to ascertain the legislative intent; and that once ascertained, it is our duty to give it a full and liberal operation. * * *[4]

NOTE ON INTERPRETATION OF FRANCHISE GRANTS IN GENERAL.—The principal case, although generally regarded as a leading case on the subject of corporate charter interpretation, has no importance peculiar to the law of corporations. There is a clear distinction between the so-called corporate franchise—that is, the right to be a corporation, which is conferred upon the individuals of which the corporation is composed—and those powers

[4] Dissenting opinion of Mr. Justice McLean is omitted.

which are conferred upon the artificial person which is created. Coe v. Columbus, etc., Ry. Co., 10 Ohio St. 372, 75 Am. Dec. 578 (1859); Memphis Ry. Co. v. Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837 (1884); State v. Western Irrigating Canal Co., 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166 (1888); State v. Topeka Water Co., 61 Kan. 547, 60 Pac. 337 (1900); Bardstown & Louisville R. Co. v. Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541 (1862); State ex rel. Atty. Gen. v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697 (1900).

Such powers, in turn, may be divided into those which any individual who is sui juris may exercise as a matter of common right and those which are not within the common rights of individuals, but can be exercised only by the sovereign, or by those to whom the sovereign has granted the privilege of exercising them. A power or privilege of the latter class is a franchise, in the true sense of that word, and an instrument by which such franchise is granted presents a distinct problem of interpretation, applicable to grants to individuals as well as to grants to corporations. Thus where, as in the principal case, the power to build and maintain a toll bridge is granted by the state to a corporation, such grant, being in derogation of public right, may well be strictly construed, and, in the absence of express stipulations making the power exclusive will not be construed as including an implied agreement by the state not to grant a similar privilege to others under such circumstances as to render the grant in question valueless to the corporation. Janesville Bridge Co. v. Stoughton, 1 Pin. (Wis.) 667 (1846); Oswego Falls Bridge Co. v. Fish, 1 Barb. Ch. (N. Y.) 547 (1846); Collins v. Sherman, 31 Miss. 679 (1856); Clarksville & R. Turnpike Co. v. Montgomery County, 100 Tenn. 417, 45 S. W. 345, 58 L. R. A. 155, and note (1897). Compare Walla Walla Water Co. v. Walla Walla (C. C.) 60 Fed. 957 (1894); Southwest Mo. Light Co. v. City of Joplin (C. C.) 113 Fed. 817 (1902); Crocker v. New York (C. C.) 15 Fed. 405 (1883).

The same strictness of construction is applied in determining the subject-matter and amount of the charges, which, under a franchise, a corporation can legally collect. Perrine v. Canal Co., 9 How. 172, 13 L. Ed. 92 (1850); Stourbridge Canal Co. v. Wheeley, 2 Barn. & Adol. 792 (1831); String v. Turnpike Co., 57 N. J. Eq. 227, 40 Atl. 774 (1898); Sturgeon Bay, etc., Co. v. Leatham, 164 Ill. 239, 45 N. E. 422 (1896). And where the franchise is by its terms exclusive, it is confined closely to the privileges expressly granted. Thus an exclusive right to build and maintain a bridge across a river and to establish and collect tolls for crossing it is not invaded by a subsequent grant of a license to operate a ferry at the same place. Parrot v. Lawrence, 2 Dill. 332, Fed. Cas. No. 10,772 (1872). See, also, Compton v. Waco Bridge Co., 62 Tex. 715 (1884). Compare Chenango Bridge Co. v. Binghampton Bridge Co., 27 N. Y. 87 (1863), and The Binghampton Bridge, 3 Wall. 51, 18 L. Ed. 187 (1865).

NOTE ON INTERPRETATION OF GRANTS OF POWER OF EMINENT DOMAIN.—The exercise of the power of eminent domain so directly affects the rights of the owner of private property that franchise grants conferring this power are held to permit its exercise only for the purposes expressly stated in the grant and for such objects as are absolutely essential to carrying out the expressed general purposes. Woods v. Greensboro Natural Gas Co., 204 Pa. 606, 54 Atl. 470 (1903); Matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601 (1888).

NOTE ON INTERPRETATION OF GRANTS EXEMPTING CORPORATE PROPERTY FROM GENERAL TAXATION.—Following the general rule that, as to subjecting particular property to the general burden of taxation, the presumption is always in favor of the taxing power, statutes and charters exempting the property of corporations from general taxation are generally held not to include within the exemption all the property which the corporations can legally hold. Inhabitants of Worcester v. Western Ry. Co., 4 Metc. (Mass.) 564 (1842); State v. Com'rs of Mansfield, 23 N. J. Law, 510, 57 Am. Dec. 409 (1852); State v. Collectors of Newark, 26 N. J. Law, 519 (1856). See, also, State v. Hancock, 35 N. J. Law, 537 (1871). Compare Milwaukee & St. P. R. Co. v. Supervisors, 29 Wis. 116 (1871); Chicago, M. & St. P. Ry. Co. v. Supervisors, 48 Wis. 666, 5 N. W. 8 (1880).

SECTION 2.—IMPLIED POWERS

In re SUTTON'S HOSPITAL (1612) 10 Coke, 23a, Coke, C. J.: "3. That when a corporation is duly created, all other (1 Roll. 513. Vin. Ab. Corp. G. Com. Dig. Franch. F. 10. Bac. Ab. Corp. D. Hob. 211) incidents are *tacité* annexed. And for direct authority in this point in 22 E. 4, Grants 30, it is held by Brian, Chief Justice, and Choke, that corporation is sufficient without the words to implead and to be impleaded, &c. and therefore divers clauses subsequent in the charters are not of necessity, but only declaratory, and might well have been left out. As 1. By the same to have authority, ability, and capacity to purchase, but no clause is added that they may alien, &c. and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, &c. that is also declaratory, for when they are incorporated, they may make or use what seal they will. 4. To restrain them from aliening or demising but in certain form; that is an ordinance testifying the King's desire, but it is but a precept, and doth not bind in law. 5. That the survivors shall be the corporation, that is a good clause to oust doubts and questions which might arise, the number being certain."

MOSS v. AVERELL.

(Court of Appeals of New York, 1858. 10 N. Y. 449.)

Action against the defendant as a stockholder in the Rossie Lead Mining Company, a corporation authorized to engage in raising and smelting lead ore, to enforce, in favor of the plaintiff as creditors, the individual liability of the defendant under the charter.

The plaintiff was the holder of promissory notes issued by the company in payment for the certain real and personal property purchased from Moss and Knapp, and formerly used by them, in the business of smelting. In addition to the smelting house and tools the property included certain houses for workingmen, fifty acres of land, the timber on which was used in smelting, also a lease of certain boats, used in transporting ore.

On the part of the defence it was insisted that the purchase of the property and the giving of the notes were not authorized by the corporation, and that a portion of the property was such as the corporation had no right to purchase. A motion by the defendant for a nonsuit for these causes was denied, and the defendant excepted. Verdict and judgment for the plaintiff, for the amount of the notes.

There was an affirmance at general term, and the defendant appealed to this court. Additional facts are stated in the opinion of Mr. Justice WILLARD.[5]

WILLARD, J.[6] * * * The acts of corporations may be proved in the same way as the acts of individuals. If there be no record evidence, they may be proved by the testimony of witnesses; and even where no direct evidence of such acts can be given, facts and circumstances may be proved from which the acts may be inferred. The tendency of the modern decisions is to assimulate the actions, rights, duties and liabilities of corporations to those of individuals. Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552; Bank of Columbia v. Patterson's Adm'rs, 7 Cranch, 299, 3 L. Ed. 351; Trustees v. Cagger, 6 Barb. (N. Y.) 576, 580; Perkins v. Washington Insurance Company, 4 Cow. (N. Y.) 645; Munn v. Commission Company, 15 Johns. (N. Y.) 44, 55, 8 Am. Dec. 219; Conro v. Port Henry Iron Company, 12 Barb. (N. Y.) 27, 53. Moss & Knapp made an absolute conveyance in presenti of all the smelting property to the corporation, and the proper corporate officers gave their notes for the price, and took immediate possession of all the property, and used and employed it in its corporate business of smelting lead. This act of payment and taking possession was an unequivocal act of ratification. Subsequent ratification is equivalent to previous authority. Moss v. Rossie Lead Mining Company, 5 Hill (N. Y.) 137; Clark's Executors v. Van Riemsdyk, 9 Cranch, 153, 3 L. Ed. 688; Conro v. Port Henry Iron Company, 12 Barb. (N. Y.) 27, 53; Corning v. Southland, 3 Hill (N. Y.) 552.

The purchase of the property of Moss & Knapp for which the notes in question was given was within the scope of the legitimate business of the company. The business for which the company was incorporated was "for the purpose of raising and smelting lead ore at Rossie." Had the company embarked at the beginning in both branches of the business, no doubt can be entertained that they would have been empowered to adopt the proper means, and to make the requisite purchases for accomplishing those objects. Acts of 1837, p. 441, § 1; 1 R. S. p. 599, § 1. The officers of the company saw fit in the beginning to restrict their operation to one branch of the business for which they were incorporated, that of raising the ore, and to employ Moss & Knapp to perform the business of smelting. At length they judged it for their interest to purchase the works of Moss & Knapp, and to carry on both branches of business themselves. They did not embark in any other business than that for which they were incorporated. The property they purchased had been got together by Moss & Knapp for the smelting business and nothing else, and was necessary to carry on that business. It was situated in

[5] Statement of facts substituted.

[6] A part of the opinion is omitted.

a new country, at a distance from any village, and required for the accommodation of their hands the erection of suitable habitations. The country was a wilderness and had to be cleared. The men and animals employed by them had to be supported. If they raised a little grain on their clearings it must be harvested and prepared for food, or it would be lost. The few implements of husbandry which had been procured by Moss & Knapp were of no value to be removed and were sold in a lump with the residue of the property. They were mere incidents, and whether added to the inventory or omitted would not eventually have varied the result. One of the shanties had been used by Moss & Knapp as a school-house for the children of their men. Whether it was so used at the time of the purchase, does not appear. It would have been no objection to the validity of the sale had it been at that time devoted to so laudable an object. There was no attempt on the part of this company to divert their fund from the legitimate objects of the charter, to the support and endowment of literary institutions, or for agricultural purposes.

The company had the same right to compromise and settle the claim which Moss & Knapp had against them, as to pay or to compromise any other debt. And they had the same right to do either, that a natural person possesses in relation to his outstanding liabilities. * * *

On the argument the greatest stress was laid upon the objection that the corporation had no right to make the purchase of the smelting works; and certainly not of the building called a school-house, and the implements of husbandry mentioned in the inventory. A few observations will be added on this branch of the case.

It is conceded that, in addition to the powers enumerated in the Revised Statutes, and those expressly granted by its charter or act of incorporation, no corporation can possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given. This principle is expressly enacted. 2 R. S. p. 600, § 3. Had the corporation subscribed $15,000 for the erection of a chapel to Union College, or purchased a farm for an agricultural seminary, or a wholesale store in the city of New York for the general purposes of trade, it would not have been denied that those acts were unauthorized by the charter. In a case so strongly marked as the ones supposed, the judge at the circuit would have been authorized to nonsuit the plaintiff, if the sustaining of the action required the acknowledgment of the validity of those acts, or to direct a verdict in conformity to the law. But where a case is not so strongly marked, when the property purchased falls within the general scope of the charter, and the only objection is that some articles, apparently unnecessary, are included, the good faith of the purchaser should be submitted as a question of fact to the jury. The corporation should not be permitted to repudiate the purchase after acquiring the plaintiff's property, except under circumstances which would jus-

tify an individual to repudiate it. The individual stockholders are in no better plight than the corporation.

The defendant did not ask to submit the question to the jury, whether the property purchased was adapted to the legitimate business of the corporation, but he called upon the court to nonsuit the plaintiff upon the ground, among others, that the debt for which the notes were given was not contracted in the ordinary and legitimate business of said company, or within their corporate powers. He thus called upon the court to decide, as matter of law, what was the appropriate province of the jury to determine under suitable instructions. The objection to the purchase was not of such a character that the court could, as matter of law, pronounce it void. * * *

A case must be strongly marked which would warrant a judge in pronouncing a purchase void, without submitting it to the consideration of a jury.

On every ground, therefore, I think the judgment should be affirmed.

RUGGLES, MASON and MORSE, JJ., concurred. JEWETT, GARDINER, JOHNSON and TAGGART, JJ., were for reversal.

This being the second re-argument of the cause, and a majority of the judges not agreeing, by force of the statute, judgment affirmed.[7]

CLARK v. FARRINGTON.

(Supreme Court of Wisconsin, 1860. 11 Wis. 306.)

Action by William D. Clark against William Farrington and wife on a promissory note made by the latter to the order of the La Crosse & Milwaukee Railroad Company. The note was secured by mortgage on certain real estate. The note was given for shares of stock in the railroad company.

Appeal from the decision of the trial court holding that the railroad company had no power to accept for this stock a note and mortgage in lieu of cash; that the stock delivered had no legal value; that the defense is good against the plaintiff.[8]

PAINE, J.[9] * * * The question is, Had the companies the power to take these notes and mortgages for stocks? In this case it arises under the charter authorizing the construction of a railroad from Milwaukee to La Crosse. The counsel for the defendants contend that the company had not the power, and that the transaction was a violation of its charter. To lay a foundation on which to sustain this position, they cited a large number of authorities establishing the propo-

[7] Compare: People v. Pullman Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366 (1898).

[8] Statement of facts substituted.

[9] A part of the opinion is omitted.

sition that a corporation has no powers except such as are conferred by its charter; and that its acts outside of those are void. This is too well settled to admit of dispute, and a moment's consideration of the great increase of corporations in modern times, and of the vast powers entrusted to them, as well as of the natural tendency of their accumulated capital to accumulate also influence and power, is sufficient to satisfy every intelligent mind of the absolute necessity of adhering to the rule of confining these bodies strictly to the accomplishment of those ends and objects which their charters authorize, and prohibiting them from all others. But while this is conceded, it is also true that to these organizations is entrusted the accomplishment of "enterprises of great pith and moment," which, when properly executed, contribute greatly to the convenience and prosperity of mankind, and even to the advancement of civilization—enterprises impossible to private unassociated capital, and which sometimes task even the enormous energies of corporations beyond their strength, so that after expending the best efforts of human ingenuity to accomplish the end, they either fail entirely, or succeed perhaps in completing an improvement of which others may reap the benefit, only by the pecuniary ruin of its originators.

These considerations are sufficient to show that the rule that corporations can exercise no powers not delegated, should not, from an undiscriminating timidity or apprehension, be extended so as to unwisely and unnecessarily cripple and restrict them, as to the means of executing the powers that are delegated. Powerful as they are, it must be assumed that the law is powerful enough not only to control and confine them within their proper limits, but also within those limits, to allow them the exercise of a reasonable discretion in selecting among the various means that may be adapted to the execution of their powers. It is accordingly held in a large class of cases, many of which are cited by the counsel for the plaintiff, and which we do not deem it necessary to refer to in detail, that a corporation may adopt any of the usual means employed to accomplish the purposes authorized by its charter. It is true, that this right of selecting among the means adopted to the end, is generally stated as limited to those usual and necessary. But precisely what limits those terms imply does not seem to be well defined.

The constitution of the United States gave Congress the power to pass all laws "necessary and proper" for carrying into execution the powers conferred upon the federal government. That government chartered a bank, and its constitutionality being called into question, the supreme court of the United States placed a construction upon these words. They held that the word "necessary" did not imply that the means used must be absolutely indispensable, but that the government might select any which were "needful," "requisite," "essential," or "conducive to" the end, and tended directly to its accomplishment, and therefore might charter a bank. Whether or not it

justifies that conclusion, there is undoubtedly great force in the reasoning of Chief Justice Marshall, as to the necessity of the power on the part of the government to select convenient means for the execution of its powers. And bearing in mind the disproportion between the powers of a government and those of an ordinary corporation, we think that reasoning goes to sustain the right of the latter to an equal freedom in selecting among various means proper for the execution of its powers. There is a close relation between the principles applicable to the government of the United States and those applicable to a corporation. The former like the latter can exercise no powers except such as are delegated to it either expressly or implied as necessarily incident to those expressly delegated. The reasons for confining both within the limits of the delegated powers are equally obvious and familiar, yet this being constantly conceded, it by no means follows, that either, within those limits, should be restricted, with narrow and illiberal rigor, in the choice of means adapted to the execution of their respective powers. And the same reasoning which excludes such rigor in the case of the government, in our opinion, justifies its exclusion in the case of a corporation. But in applying it to the latter, due allowance should be made for the difference in the magnitude of their powers, for it would not at all follow that a corporation might adopt any means which the government might. * * *

This doctrine must, of course, be properly understood. It does not mean that a corporation may engage in a separate distinct business, not authorized by its charter, as a means of raising funds to accomplish the things authorized. This it could not do. A railroad company could not engage in banking, nor in manufacturing, nor speculating in real estate, as a means of raising money to build a railroad. It is only that it may adopt any convenient means proper in themselves, tending directly to the execution of the powers conferred, and not amounting to the transaction of any distinct, unauthorized business; though such means may not have been usually adopted in the execution of like powers.

We have, then, two established propositions of law:

1. A corporation can exercise no powers except those conferred by its charter.

2. In executing those powers it may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business.

In order to decide this case, two questions remain to be determined. Was the taking of the note and mortgage for stock an attempt by the company to execute powers not delegated? Or was it a mere means of executing those that were conferred? If it was the latter, then was it a means which the company was prohibited from using?

Upon the first question there seems to be no room for doubt. The company did not attempt to do anything, except to execute its power of building a railroad. The defendant was willing to take stock,

but had not the money to pay for it. He was willing to give his note for it, and secure it by a mortgage. The company took it in payment with the sole intention of transferring it to raise the money. The result is the same as it would have been if the defendant had mortgaged his farm to a third party, and obtained the money himself, and paid it for his stock. In the end, by either method, the company has the money, the defendant the stock, and the third party the note and mortgage. The company has simply resorted to a double transaction to get the money for stock, instead of a single one. But it was a means tending directly to the execution of its power of building a railroad, by disposing of its stock for the money necessary therefor.

The other question is, whether this means was prohibited to the company? And towards this point the strongest arguments for the mortgagors is directed. It is said that the charter provides a specific method of raising funds for building the road; that is, by opening books for subscription for stock, and then requiring payment from the subscribers; and that this method having been provided for, every other is necessarily excluded. As a part of the argument, it is assumed that the charter contemplates and requires a payment in cash, and therefore, that the company is in effect forbidden to receive anything else as such. This assumption is, of course, necessary, for the validity of the whole argument depends upon it. Let us examine whether it is correct. There is no express provision in the charter that the stock must be paid for in cash. Is such a provision implied? It was suggested that the language fixing the amount of each share at one hundred dollars, necessarily implies that the payment must be in cash. It was said that "dollars," meant money, and was not descriptive of anything else. But these suggestions seem entitled to but little weight when it is remembered that money is the standard of value and is used as the representative and measure of the value of all other articles. Thus a note to be paid in specific articles, is drawn for the payment of so many dollars in the articles agreed on. The use of the denomination of money, to fix the amount in value, is necessary in all such instruments. And the mere circumstance that the legislature used that language in fixing the amount of each share of the capital stock, cannot be considered as indicating any intention that the shares must necessarily be paid for in cash. Because such a literal construction would require the company to keep its capital stock, consisting of money. For that capital stock is to continue after the road is built, and would still consist of shares of one hundred dollars each. And if the use of the word "dollars" necessarily requires each share to be paid for in cash in the first instance, it would equally require it to continue in money. * * *

[After discussing the authorities the court proceeds:]

We are satisfied, therefore, that the authorities utterly fail to sustain the position here contended for, that this company had no power

to dispose of its stock for anything except money. But that, on the contrary, they show with entire unanimity, as well by silent acquiescence as by positive adjudication, that it had the power to dispose of it in such a manner as would accomplish the objects authorized by the charter.

It was said that taking the mortgage was an unwarrantable dealing in real estate, but this is not so. There is nothing in the transaction approaching a speculation in lands. The mortgage is taken as a mere security, and as such is only an incident to the debt. It is simply obtaining by contract what the company could obtain by operation of law on any ordinary stock subscription. Where there was default in payment, judgment could be recovered, which would be a lien on real estate. It would be a mere means of collecting the debt, and the mortgage was nothing more. Suppose such a suit brought, could not the company settle it on the party's securing the debt by mortgage? Could they not take from a willing party, by contract, what the law would give them against him if unwilling, that is, a security for the debt on his real estate? We can see no reason to doubt it. And if they could do it on the settlement of a suit, there is no more objection to it in the first instance, without suit. Ang. & Ames on Corp. § 156. But it is further said that such a contract is a fraud on the cash-paying subscribers. It is a sufficient answer to say that those subscribers do not complain. If the transaction is liable to no other objection, a party to it cannot set up his own fraud to defeat his contract, when the party defrauded chooses to acquiesce. Redfield on Railways, 87, 88, and note. But we are unable to perceive that the objection is valid. The directors are the agents of the stockholders, and their acts, within the powers conferred, are binding on the latter. This mode of receiving payment for stock was directed by them, and it being within the scope of their authority, it was to be deemed assented to by all. It is to be assumed that the company could negotiate the securities for their present worth, which would be equivalent to the full amount paid in successive installments.

We are therefore clearly of the opinion, that the company had power to make this contract, and that the securities are valid. It was not an attempt to go outside of its charter and accomplish things unauthorized, but was a means of executing the powers granted, as to which, except so far as positively restricted, the company possessed the powers of an individual. Says Justice Nelson, in Willmarth v. Crawford, 10 Wend. (N. Y.) 342: "Unless there is some express restriction, either in the charter or some other act of the legislature, as to the nature of the evidence of the debts due to or from them, or securities to be taken or given by them, they have in this respect the same powers that belong to individuals. Corporations, while acting within the scope of their authority under the act creating them, that is, in the execution of the powers granted to or duties imposed upon

them by the charters, are to this extent and end like natural persons." And our whole conclusion is only an application to corporations of the rule familiar as between individuals, that securities may, by contract, be received in payment.

The court below erred in holding these securities invalid, and the judgment must be reversed, with costs, and the cause remanded for further proceedings.

STATE ex rel. BRADFORD, ATTY. GEN., v. WESTERN IRRIGATING CANAL CO.

(Supreme Court of Kansas, 1888. 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166.)

Proceeding in quo warranto. Action by the state against the Western Irrigating Canal Company, praying that the defendant be required to show by what authority it holds, possesses, and assumes to exercise the powers and franchises granted to the Enterprise Irrigating Company; that the plaintiff have judgment of ouster against the defendant in the further exercise of their powers, etc. At the trial a deed was offered in evidence by plaintiff, showing that the Enterprise Irrigating Company had sold its right of way, together with its canal, also its franchises, of whatever kind or description, to the Western Irrigating Canal Company.[10]

HORTON, C. J. It is claimed that the Enterprise Irrigating Company, even if its stockholders desired it, had no right to sell all of its property, surrender its franchises, and terminate its existence, without the assent of the state. Therefore that the Western Irrigating Canal Company could not execute the powers, privileges, and franchises granted to the Enterprise Company. For the purposes of this case we assume this to be true, and that so much of the deed of December 11, 1886, as attempts to transfer and convey the franchises of the Enterprise Company, is wholly void; and yet we do not think the plaintiff is entitled to its judgment of ouster in this action. The Enterprise Company was organized under the laws of the state, and had the power, during its existence as a corporation, "to hold, purchase, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation should require. * * * Also to enter into any obligation or contract essential to the transaction of its ordinary affairs." Section 11, c. 23, Comp. Laws 1885. See, also, the general provisions of chapter 23, Comp. Laws 1885, relating to private corporations. The word "franchise" is generally used to designate a right or privilege conferred by law. What is called "the franchise of forming a corporation" is really but an exemption from the general rule of the common law prohibiting the formation of corporations. All persons in this state have now the right of forming

[10] Statement of facts substituted.

corporate associations, upon complying with the simple formalities prescribed by the statute. The right of forming a corporation, and of acting in a corporate capacity, under the general incorporation laws, can be called a franchise only in the sense in which the right of forming a limited partnership, or of executing a conveyance of land by deed, is a franchise. 2 Mor. Priv. Corp. § 923. Even if the Enterprise Company had attempted so to do, it could not, we suppose, sell or convey its corporate name, or its right to maintain and defend judicial proceedings, or to make and use a common seal.

It is not essential to the existence of a corporation that it should possess property. Its legal existence, therefore, is not necessarily determined by the deed or its attempted conveyance. Its franchises remained, although the corporation may have conveyed all its property. There is no stockholder or creditor intervening or objecting. Therefore we are not called upon to consider the rights of such parties. There is no complaint that the property of the Enterprise Company was not properly acquired, and that the corporation legally owned it. The power to sell or dispose of the same necessarily attached as an incident to the ownership. If the corporation could convey a part, it could convey all, if its stockholders assented, and its creditors, if it had any, did not interfere or object. It may be that the business of the Enterprise Company had proved unprofitable, and rendered it necessary to dispose of its property, and wind up the concern, as the only means of avoiding insolvency. It may have been necessary to sell the whole of its property in order to raise means to pay its debts and avoid a sacrifice by forced sale. In either event, the sale and conveyance of the property, with these objects in view, would be a lawful purpose of the corporation. Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Manufacturing Co. v. Bank, 119 U. S. 191, 7 Sup. Ct. 137, 30 L. Ed. 384; Town v. Bank, 2 Doug. (Mich.) 530; Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

A private person could make a transfer of all his property, if it was done bona fide. Now, the Enterprise Company possessed all of the powers of a private person in regard to the disposition of its property. It had the absolute jus disponendi.

The route and profile of the Western Irrigating Canal Company is practically the same as that laid out and proposed by the Enterprise Company. The Western Company, under the statute, has full power to purchase and hold real and personal estate for the purposes of the corporation. Therefore the Western Company was acting for the benefit of its stockholders when it purchased and took possession of the right of way of the Enterprise Company, and in purchasing and taking possession of such property it was carrying out the purposes of its corporation. Under its charter, it had the power to excavate and construct an irrigating canal, commencing at some point in section 35, in township 27 south, of range 22 west, on the north

bank of the Arkansas river, in Ford county, Kan., with dam and such lateral ditches as it deemed necessary for irrigation, waterworks, and manufacturing purposes. Upon the agreed statement of facts, and the evidence produced upon the trial, the Western Canal Company is only exercising the powers, privileges, and franchises conferred by its charter of November 26, 1886. In taking possession of and in using the property purchased of the Enterprise Company it exercises its own rights and privileges.

Again, all of the franchises of the Enterprise Company have been extinguished by the state in an action brought in this court for that purpose. The state has resumed its franchises, and that company is no longer in existence. Therefore the Western Canal Company cannot exercise the powers, privileges, and franchises granted the Enterprise Company, because they have been taken away by the state, and the latter company has no franchises to be exercised by any person or corporation.

Further, if the deed from the Enterprise Company to the Western Company transfers and conveys nothing, as it is alleged, then, of course, there is nothing to complain of. If the Western Company has not obtained any right or title to the public domain over which its right of way is laid out, the state has no cause of action therefor.

Judgment will be rendered in favor of the defendant for all costs. All the justices concurring.

PHILLIPS v. PROVIDENCE STEAM-ENGINE CO.

(Supreme Court of Rhode Island, 1899. 21 R. I. 302, 43 Atl. 598, 45 L. R. A. 560.)

Bill by Theodore W. Phillips against the Providence Steam-Engine Company.

STINESS, J. The complainant, a stockholder, seeks to restrain the respondent corporation from disposing of its property. The company is doing business under an extension by its creditors, in the terms of which an installment becomes due in November next. It is agreed that this cannot be met, and that the company will be unable to go on in business, because the creditors refuse a further extension. In view of these facts, an arrangement has been made to form a new company, in which creditors holding extension notes will take preferred stock to the extent of one-half of their claims, while other subscribers will furnish enough cash to pay for the plant and provide a working capital. The terms of the proposed sale give to the present stockholders $70,000 over and above the indebtedness of the company, amounting to about $228,000, making a total payment of about $298,000. The estimates of the value of the property vary from $327,000 to $397,000,—the latter being the complainant's esti-

mate,—but it does not appear that either party has reason to expect that either sum would be realized at a forced sale.

This is not a sale in which the other stockholders are to gain any advantage, beyond the privilege, which is also offered to the complainant, of taking his proportionate amount of cash or its equivalent stock in the new company, as he may prefer. It is, in effect, a cash sale to strangers, approved by stockholders representing 3,675 shares against 75 held by the complainant. While this majority cannot affect any rights to which he is entitled, it tends to show a fair price. It is a well-known result, to which courts of justice cannot be blind, that large plants of this kind are often, if not usually, sold at a great sacrifice in case of a forced sale. We should not have to go outside of the records of our own court to find proof of this fact. A sale being necessary, the question is, how shall it be made? The prayer of the bill is that a receiver may be appointed, that the business may be wound up and the company dissolved; and the argument is that the sale of the effects should be at public auction.

The question, then, is whether the complainant is entitled to such a decree.

There is a difference of opinion as to the power of a corporation to sell its entire property, and thus practically to retire from business. Some courts hold that it may be done by the consent of all the stockholders (7 Am. & Eng. Enc. Law [2d Ed.] p. 734, note 1), and others hold that it may be done by a majority (Id. notes 2–4). All of the authorities cited in note 1, however, do not hold that the consent of all the stockholders is necessary; e. g. Treadwell v. Manufacturing Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Wilson v. Miers, 100 E. C. L. 348; and others. But the editor adds, "There seems to be no doubt that it may do so when it is no longer able to profitably continue its business."

We think that this is the correct rule. It has been recognized in this state. Hodges v. Screw Co., 1 R. I. 312, 350, 53 Am. Dec. 624. In Wilson v. Proprietors, 9 R. I. 590, Brayton, C. J., said: "No case has been cited, and, in view of the diligence of counsel in this case, we may say there is no case, which holds that where the purpose of the incorporation could not be accomplished, the business contemplated could not be carried on,—where the capital had been exhausted in endeavors to go on, having no means to go further,—a company thus laboring under burdens which they could no longer bear could not release themselves by a surrender of their franchise to the state which granted and which was willing to receive it, and that by a majority. This is not only for their benefit, but it is a necessity, and it would be hard indeed if one stockholder could by his dissent prevent such relief against the prayer of all other members of the company." In Peabody v. Water Works, 20 R. I. 176, 37 Atl. 807, a necessary limitation to this rule was recognized, in the words: "The action of the company was taken by a vote of more than 1,100 out of

a total of 1,350 shares. There is no proof of unfairness, oppression, or fraud in such action. The case, as presented, is simply that of a stockholder who differs from a large majority of his fellow stockholders as to the expediency of a sale."

The principle upon which these cases rest is that a corporation may dispose of its property by a majority vote, in cases which are free from unfairness, oppression, and fraud. Against wrongs of this kind equity will interfere. To this effect are Lauman v. Railroad Co., 30 Pa. 42, 72 Am. Dec. 685; Treadwell v. Manufacturing Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Leathers v. Janney, 41 La. Ann. 1120, 6 South. 884, 6 L. R. A. 661; Sewell v. Beach Co., 50 N. J. Eq. 717, 25 Atl. 929; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Warfield v. Canning Co., 72 Iowa, 666, 34 N. W. 467, 2 Am. St. Rep. 263; Wilson v. Miers, 100 E. C. L. 348. See, also, Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

The complainant does not charge improper conduct, but simply that he considers the price inadequate and unjust, and hence he prays for a receiver, and a sale of the property by auction. Ordinarily, when a court orders a sale, it can only be done by auction. A court cannot negotiate a private sale, and it orders an auction, as the fairest chance for all parties to bid and buy. But when the parties in interest have negotiated a sale which is fair to all concerned, and there is nothing to show that a larger price may reasonably be expected, it does not follow that an auction sale would be ordered. This question was considered in Quidnick Co. v. Chafee, 13 R. I. 402, in which the trustee had an offer for the entire property, approved by nearly all the creditors. Then other parties intervened, agreeing to bid the amount named at auction, and the court ordered a sale by auction. In the present case there is no evidence that anybody is willing to give as much as the offer proposed, or that there is any reason to suppose that it will bring as much or more. The only testimony put in by the complainant is that the tools will probably bring more than they are valued at by the company, while, as to the bulk of the property,—the real estate, etc.,—there is no evidence of market value. Moreover, the complainant does not show that he desires to bid upon the property himself, or that he knows of any one who would bid at a sale. In this absence of evidence that a larger total might be expected from an auction sale, we see no reason to disturb the agreement already made, which, upon the testimony given, seems to be fair.

The complainant relies strongly on Mason v. Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524. In that case the court had appointed a master to value the property, which he reported to be nearly $500,000. A majority of the company had arranged a sale to themselves at $50,000. Naturally, in view of such gross inadequacy, the court ordered a sale by auction. The case was very different in its details from the case before us. In Wilson v. Proprie-

tors, 9 R. I. 590, the city of Providence had control of the corporation, and had sold the corporate property to itself. The court restrained the city from taking possession, and ordered a sale by auction. That, too, was a different case from this one.

The court is bound to look to the interests of all parties, and especially to protect the rights of a minority from oppression and fraud. But where, as in this case, no such thing is charged, and nothing is shown to lead to the belief of a better total price, the complainant makes no case for interference. To show that movable tools may be sold at a price somewhat, but not largely, higher than that at which they are scheduled, is quite a different thing from showing that the plant as a whole would sell for more than the price offered. To set aside the sale under these circumstances would be to risk a certainty for an uncertainty, without any testimony on which to base a hope of benefit to the stockholders from such interference.

We see no reason for such a step in the dark. Bill dismissed.

BROWN et al. v. WINNISIMMET CO.

(Supreme Judicial Court of Massachusetts, 1865. 11 Allen, 326.)

The suit is founded on an agreement by which the defendant company agreed to charter to plaintiffs their iron ferry boat Winnisimmet, with the understanding that she was to be rechartered to United States. Plaintiffs to pay $125 per day rent, and account to the company for one half of all sums realized on a rechartering in excess of $125 per day under a charter executed. The company has collected from the United States at the rate of $200 per day. The declaration was on an account annexed. One item being a charge of $1650 for one half, cash due and paid by the United States to the defendant company as charter money. Plaintiff had verdict and defendants allege exceptions. Among other questions presented on appeal was whether or not the company had authority under its charter to make the lease in question.[11]

BIGELOW, C. J.[12] The main defence to this action appears to have been that the contracts or agreements on which the plaintiffs rely in support of their claim against the defendants were such that the latter had no power or authority to make them under the act of the legislature by which they were incorporated, and that they cannot for that reason be enforced in a court of law. The later English authorities seem to sanction the doctrine that such a ground of defence, although it may be "unbecoming and ungracious," or, in the stronger language of Lord St. Leonards, "indecent," is nevertheless legal and valid, if it be made to appear, either by the express provisions of an act of incorporation or by necessary and reasonable implication there-

[11] Statement of facts substituted. [12] A part of the opinion is omitted.

from, that a contract which is sought to be enforced in an action at law against a corporation is beyond the scope of the powers granted by its charter; or, in other words, that the legislature did not intend that the body created by them should enter into contracts of a character like that which a plaintiff makes the foundation of a claim against it. South Yorkshire Railway, etc., v. Great Northern Railway, 9 Exch. 55, 85; Bateman v. Ashton-under-Lyne, 3 Hurlst. & Norm. 323; Norwich v. Norfolk Railway, 4 El. & Bl. 397, and cases cited; Hawkes v. Eastern Counties Railway, 1 De G., Macn. & Gord. 737, 760. A similar doctrine has been recognized and applied by courts in this country. Pennsylvania, etc., Steam Navigation Co. v. Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; Hood v. New York & New Haven Railroad, 22 Conn. 502; Pearce v. Madison & I. R. Co., 21 How. 441, 16 L. Ed. 184; Angell & Ames on Corp. 256, and cases cited. It is on the principle which seems to be adopted by these authorities that the defendants rely to defeat the present action.

We have no occasion now to examine at length into the correctness of this doctrine, or to ascertain with precision its proper limitations or operation, because we are of opinion that the defendants do not bring the case at bar within any recognized application of the rule. Looking only at the words of the act by which the defendants were incorporated, St. 1833, c. 197, we are unable to say that the contracts on which the plaintiffs rely are so far foreign to the object for which a charter was granted to the defendants as to require us to declare them to have been ultra vires and illegal, and that no action upon them can be maintained in a court of law. In the absence of all evidence of extraneous facts, and taking the case as it was presented at the trial, on a comparison of the contracts set up by the plaintiffs with the act incorporating the defendants, it appears to us that the scrupulous care and anxiety to keep within the limit of their corporate powers, which the defendants now manifest will not avail them in defence of this action, although it may induce them to exercise a greater caution in entering into contracts which they cannot fulfill without violating their charter. They were incorporated with power to establish, continue and maintain a ferry between the city of Boston and the town of Chelsea, and were authorized to own, hold and possess vessels, steamboats and such other personal property, not exceeding in value one hundred thousand dollars, as might be necessary and convenient for the better management of such ferry and of the affairs of said corporation. There can be no doubt that under this charter the main purpose for which the defendants were incorporated was to carry on the transportation of persons, vehicles, merchandise and other articles by means of a ferry across Charles River between the points designated in the act. All else was to be subordinate and incidental to this main design. So far, the argument urged in behalf of the defendants is sound and irrefragable.

But the next step is not so easily taken, nor does it lead to the point at which the defendants seek to arrive. It was not shown at the trial that the steamboat which was the subject of the contracts with the plaintiffs was not a necessary and proper vessel to be used by the defendants in the prosecution of the business of their ferry, nor that by reason of its ownership they had exceeded the limit of personal property which they were empowered by their charter to hold. Nor could it be properly inferred that it was not reasonably required for the legitimate business of the corporation, because it was not in actual use by them on the ferry at the time the contract for letting it was entered into with the plaintiffs, and because it was chartered under that contract for the use of the government of the United States. Such an inference could be made only on the theory that the defendants were so restricted by their charter that they could not hold any greater number of vessels or steamboats than were absolutely required for present or immediate and constant use on their ferry, or, if they could be allowed to possess a larger number, that they could not use or employ them in any other business or for any other purpose whatever, but must suffer them to remain at their wharf to decay or deteriorate for the want of use, or, at least, in a condition in which they could be of no advantage to themselves or others.

But we think such a narrow and restricted construction of the powers granted to the defendants is inconsistent with any reasonable view of the intention of the Legislature in conferring on them a corporate franchise, and is not required by any considerations of justice or sound policy. On the contrary, we cannot doubt that under their charter they are authorized to hold any amount or kind of personal property, within the limit of value fixed by the act, which they may deem necessary or expedient for the proper conduct and management of the business of the ferry; that it is no excess of their corporate powers to own steamboats which are not required for immediate or constant use in the daily prosecution of their ordinary business, but which may be convenient or useful in case of sudden emergency or accident, or when those which are employed in the regular service of the ferry might be withdrawn for repairs; that it is not necessary that such extra or additional steamboats should be kept unemployed when not required for the business of the ferry, but that it is competent for the defendants to use them or to let them to others to be used in carrying on any legitimate business for which they are suitable, such as the towage of vessels and the transportation of passengers or merchandise, so long as such use is only temporary and incidental to the main purpose for which they are owned by the defendants.

We know of no rule or principle by which an act creating a corporation for certain specific objects or to carry on a particular trade or business is to be strictly construed, as prohibitory of all other dealings or transactions, not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to

that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created. For example, it might perhaps be held that a corporation established for the purpose of manufacturing cotton and woollen cloth could not properly invest all its capital in mill powers and privileges, and engage exclusively in the business of leasing them to others to be used for manufacturing purposes, or that it could not lawfully confine its operations to the making of steam-engines and machines for sale. But no one could doubt that it would be within the scope of its powers to allow another person or corporation, for a reasonable compensation, to draw surplus water from its mill-pond, or to employ that portion of its steam power which was not required for its own use. So a stage-coach company or a street railway corporation would exceed its corporate powers if it engaged extensively in the transportation of passengers and merchandise on land or sea by steam; but it would be acting strictly within the limits of its capacity if it should occasionally let a horse or a coach or car, not required for its own immediate purposes, to another person or corporation, or should enter into a contract for the employment of its horses in another occupation during a portion of the year when the business of the corporation did not require their use. We can see no substantial difference between transactions of this character and that which the defendants entered into when they made the contracts with the plaintiffs.

These views of the extent of the authority granted to the defendants by the legislature are a decisive answer to the defence relied on by them at the trial. The steamboat, under the contract with the plaintiffs, was let to the United States in a season of great public exigency, for military purposes; the defendants did not part with her control for any definite period of time, but only from day to day, nor did they send her to a great distance, where she could not be speedily recalled. The defendants retained the right and power to resume the possession and use of her at any moment. In this state of facts, we are of opinion that the court below took a correct view of law, and was right in refusing to rule, as requested by the defendants, that the contracts entered into with the plaintiffs were not authorized by the defendants' charter, and were therefore void. * * *

Exceptions overruled.[18]

[18] Accord: Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515 (1896), semble.

PLANT et al. v. MACON OIL & ICE CO. et al.

(Supreme Court of Georgia, 1898. 103 Ga. 666, 30 S. E. 567.)

Petition by R. H. Plant and another against the Macon Oil & Ice Company and others for an injunction. Judgment for defendants, and plaintiffs bring error.

LEWIS, J.[14] This was a petition filed by R. H. Plant and W. E. McCaw, as minority stockholders of the Macon Oil & Ice Company, a corporation, against that company, E. N. Jelks, R. J. Taylor, and the Southern Phosphate Works, for an injunction to prevent the corporation from making or carrying into effect a lease of its property and franchises, which petitioners contended was ultra vires. * * *

It was contended by counsel for the plaintiffs that the enumeration of the powers granted to this corporation by the order of the judge of the superior court excluded the exercise of all powers not conferred by its charter; that the order of incorporation did not include the power to lease the entire plant of the corporation,—or, in other words, to go out of business as a manufacturing concern. The general doctrine that the powers of a corporation, whether public or private, are such only as are conferred by its charter, either expressly or by fair implication, is too well settled to require discussion. The question, however, whether a private corporation, unless expressly restrained by statute, has an unlimited power of alienating or leasing its property, is one upon which the authorities do not apparently agree. A distinction must be drawn between the powers of a public corporation and those of a private corporation in this particular.

Our attention has been called to the cases of Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950, and Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83, in which that court ruled that a railroad company, unless specially authorized by its charter, or aided by some other legislative action, cannot, by lease or other contract, for a long period of time, turn over to another company its appurtenances, franchises, and powers. In Reese, Ultra Vires, § 137, it is stated: "This rule is based upon the theory that public or quasi public corporations, which possess and exercise the right of eminent domain or its equivalent, owe duties to the public as well as to their stockholders; and they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority." The public, however, have no such interest in the franchises of a private corporation; and that rule cannot, with the same force, be applied to an alienation made by the latter class.

[14] A part of the opinion is omitted.

Tayl. Corp. § 132. In 4 Am. & Eng. Enc. Law, p. 219, is this text: "Corporations, unless expressly restrained by statute, have an unlimited power of alienation, like that of an individual; and, since the greater power includes the less, they may lease property, which is but a partial or temporary alienation." In Treadwell v. Manufacturing Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490, this right of alienation, in pursuance of the vote of a majority of the stockholders against the protest of the minority, was recognized. On page 404 of that case the court said: "But we entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders to wind up their affairs, and close their business, if, in the exercise of a sound discretion, they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property, is absolute, and is not limited as to objects, circumstances, or quantity,"—citing a number of authorities.

On the other hand, respectable authority can be found denying this right of alienation to a private corporation, unless expressly conferred by its charter. Among the cases relied on by the plaintiff in support of this latter view is that of Cass v. Steel Co. (C. C.) 9 Fed. 640, in which the power of a private corporation to lease its plant was denied by the court. It appeared, however, in that case, that the board of directors exercised this power against the protest of the holders of a majority of the stock. It further does not appear in that case that there was any emergency or necessity calling for a lease of its property by the company. Reason, as well as authority, we think, will sustain the position that neither a majority of stockholders nor the directors of a corporation as such, without special authority for that purpose, can generally do an act which, to all intents and purposes, terminates the corporation; that they could not, for instance, while the company was in a prosperous condition, upon their own mere caprice, sell out the whole source of their emoluments, and abandon their enterprise, where a minority desired a prosecution of the business. Such is the effect of rulings in the cases of Kean v. Johnson, 9 N. J. Eq. 401; Abbot v. Rubber Co., 33 Barb. (N. Y.) 578. These authorities, however, are based upon the idea of an abandonment of corporate franchises without any special necessity requiring such a course. * * *

Upon a cursory glance at the authorities above cited, and a number of others we have investigated upon the subject, there would seem at first to be an irreconcilable conflict upon the powers and rights of a majority and a minority of stockholders in a private corporation touching its authority to alienate or lease its property and franchises. But we think that nearly, if not quite, all of the authorities upon the subject can be reconciled, and that from a careful consideration of all of them together can be deduced the following principles, about which there seems to be very little, if any, conflict:

(1) First. While a public or quasi public corporation cannot, without express authority, convey or lease its property and privileges, as a general rule this can be done by a private corporation.

(2) Second. But a private corporation, limited as to duration, while doing a successful business, cannot sell out, and abandon its enterprise, over the protest of a minority of its stockholders, who have the right to insist upon a continuance of its business.

(3) Third. While a minority of stockholders have the right recognized in the paragraph just above, it cannot compel a majority to continue indefinitely in the business of the corporation, provided a majority, in arrangements to discontinue the business, fully protects the interests of the minority by payment in full of the value of their shares, should it be demanded.

(4) Fourth. A minority of stockholders cannot compel a corporation, against the wishes of a majority of the owners of the stock therein, to continue a business that would be unprofitable or ruinous in its results to the interests of all concerned. Hence it has been often held that an insolvent corporation has the right to make an assignment for the benefit of creditors, which right does not depend upon the assent of all its stockholders.

From these principles it follows as an inevitable conclusion that a private corporation has the right temporarily to lease or rent its property, when the purpose of such action is not an abandonment of its franchises, but to meet an urgent necessity of raising a fund, so as to enable it afterwards to conduct its business profitably, and to continue the enterprise for which it was created. Especially is this the case where the managing officer of the corporation remains in charge of the property during this temporary rental. The emergency for immediately raising money to meet urgent claims against the corporation in this case was clearly shown.

The trial judge was authorized in drawing the conclusion that there was no purpose on the part of the corporation of abandoning its enterprise or franchises; that, on the contrary, this temporary rental of its property was really necessary for its protection, and to enable the company to continue its business. Its own manager still remains the manager of the property during the tenancy. The rights of none interested in the company are jeopardized by this temporary arrangement. To place it in the power of a minority of stockholders, simply by refusing acquiescence, to defeat a scheme looking to the protection of the company's property, and a continuation of its enterprise, might, under certain circumstances, clothe them with the authority of wrecking the company, and defeating the very objects of its corporate existence.

It was argued by counsel for plaintiff in error that a right to rent for one year would necessarily imply, at the expiration of the lease, the power to continue the rental for another year, and so on indefinitely, and thus would follow the power of entirely and permanently

transferring the franchises of the company into the hands of another. The reply to this is, "Sufficient unto the day is the evil thereof." Should a scheme of this sort in the future be attempted without any necessity for such alienation, the plaintiffs could doubtless then have redress of their grievances. No such case is made by this record, and what we now rule is that, under the undisputed facts of this case, the judge properly exercised his discretion in refusing the injunction.

Judgment affirmed. All the justices concurring.[15]

UNION BANK v. JACOBS.

(Supreme Court of Tennessee, 1845. 6 Humph. 515.)

On the 28th day of September, 1841, Jacobs, as president of the Hiwassee Railroad Company, executed a note, binding that company to pay said Jacobs the sum of $5,641, negotiable and payable at the Branch of the Union Bank at Knoxville, four months after date. The note was endorsed by Jacobs to Trautwine, and by Trautwine to the Union Bank, and delivered to the president and directors of the Bank, and discounted by the Bank for the benefit of the Hiwassee Company. At maturity, the note was protested and suit brought by the Bank against Jacobs, as endorser, in the circuit court of Knox county.

It was tried by Judge Lucky and a jury, at the February term, 1845. He charged the jury that the Hiwassee Company had no power to borrow money, and that the note given in execution of a void contract was null and void also.

The jury returned a verdict for the defendant, and plaintiff appealed.

TURLEY, J.[16] * * * These authorities fully establish the proposition, that, in the construction of charters of corporations, the power to contract, and the mode of contracting, is not limited to the express grant, but may be extended by implication to all necessary and proper means for the accomplishment of the purposes of the charter. Now, what are necessary and proper means? Mr. Story, as we have seen, says, if the means are usual and appropriate, the implication of power arises. Story on Bills, 95.

Chief Justice Marshall, in the case of McCulloch v. State of Maryland, 4 Wheat. 413, 4 L. Ed. 579, says: "But the argument on which most reliance is placed is drawn from the peculiar language of this clause of the Constitution. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the gov-

[15] See Small v. Minneapolis Electro Matrix Co., 45 Minn. 264, 47 N. W. 797 (1891).

[16] A part of the opinion is omitted.

ernment, but such only as may be necessary and proper for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves Congress, in each case, that only which is most direct and simple. Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of the human mind that no word conveys to it, in all situations, one single definite idea, and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words, which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has no fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phases."

In conclusion upon this subject, he says [4 Wheat. 421, 4 L. Ed. 579], same case: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Now, if this be true doctrine in relation to the Constitution of the United States, surely it will not be contended that a more stringent rule will be applied in the construction of the powers of a corporation than is applied in the construction of the powers of Congress under the Constitution of the United States.

To apply these principles, as established by the authorities cited, to the case under consideration. The Hiwassee Railroad Company is chartered to construct a railroad, a thing of itself necessarily involving a heavy expenditure of money; but, in addition thereto, it is empowered to sue and be sued, to acquire and hold, sell, lease and convey estates, real, personal and mixed, which necessarily involves the power of making contracts for the same. How shall these contracts be made, both for the construction of the road and the purchase of the property? It is argued, that the capital stock of the company is the only means provided for the payment, and that no other can be resorted to for that purpose; or, in other words, that it must pay cash for every contract, for that no power is given by which it may contract upon time; for if it may create a debt, of necessary consequence it may create written evidences of that debt, and these may be either promissory notes or bills of exchange. It is true that the capital stock of the company is the source from whence an ultimate payment of the debts of the company must be made; but to hold that a sufficient amount of this stock must always be on hand, to pay immediately for every contract made, would be destructive of the operations of the company. By the provisions of the charter, not more than one fourth of the stock shall be called for in any one year, and this upon thirty days' notice; and if, within thirty days after such notice, the amount called for be not paid, the company is authorized to take steps against the delinquent stockholders, to enforce payment. Now, it is obvious that it never was intended that all the stock should be paid in before the company commenced operations. The early completion of the road was a desirable object for commercial purposes, and can it be pretended that the expenditures of the company were to be limited and restricted to the amount of capital actually paid in by the stockholders, and that under no circumstances were the company to exceed them? If, upon a failure of the means on hand, the stockholders should neglect to pay upon a proper call, are the works to be suspended until such time as payments could be enforced? Are the persons who may have done work for it, and for which they have not been paid, to wait the slow process of the law before they can receive satisfaction? And shall the company not be permitted to use its credit in such emergency? It is so argued for the defendant. This construction of the charter would be ruinous in its consequences. The company might be compelled to suspend all operations at a time when great loss would result from deterioration to unfinished work, and be greatly injured also in its credit.

The restriction contended for is too refined and technical. It might have suited the days of the Year Books, when it was held that a corporation could contract for nothing except under its corporate seal; but it is strange that it should be urged at this day of enlightened jurisprudence, when the substance of things is looked to rather than forms. A corporation is, in the estimation of law, a body creat-

ed for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by the terms of its charter, or some public law, from so doing.

There is no principle which prevents a corporation from contracting debts within the scope of its action; and, as has been observed, if it may contract a debt, it necessarily may make provision for its payment, by drawing, or endorsing, or accepting notes or bills. It is not pretended that this power extends to the drawing, endorsing or accepting bills or notes generally, and disconnected from the purposes for which the corporation was created.

The corporation, in the present case, was indebted to one of its contractors for work done upon the road, for the payment of which the note in question was drawn. This, upon principle and authority, was a usual and appropriate means for accomplishing the object and purposes of the charter, viz., the construction of the road. Not only do all the elementary writers sustain this view of the subject, but, as we have seen, there are three adjudicated cases in courts of high authority directly in its favor. The case of Munn v. Commission Company, 15 Johns. (N. Y.) 52, 8 Am. Dec. 219; the case of Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; and the case of Hayward v. Pilgrim Society, 21 Pick. (Mass.) 270.

There has not been produced a single case to the contrary. The cases cited relied upon are decided upon different grounds entirely. The case of Broughton and Others v. Company and Proprietors of the Manchester and Salford Water Works, 3 Barnwall & Alderson, 1, reported in the English Common Law Reports, 215, decides nothing more than that a corporation, not established for trading purposes, cannot be acceptors of a bill of exchange, payable at a less period than six months from the date, because such a case falls within the provisions of the several acts passed for the protection of the Bank of England, by which it is enacted that it shall not be lawful for any body coporate to borrow, owe, or take up any money upon their bills or notes payable at demand, or at any less time than six months from the borrowing thereof. It is true that Bayley, J., in his opinion, says: "There being no power expressly given to the corporation to make promissory notes or become parties to bills of exchange, I should doubt very much (even if the Bank acts were entirely out of the question) whether such corporation would have any power to bind itself for purposes foreign to those for which it was originally established;" and Best, J., in his opinion says: "I am also of opinion that this action is not maintainable, because, this case comes within that rule of law by which corporations are prevented from binding themselves by contract not under seal. When a company, like the Bank of England, or East India Company, are corporated for the purposes of trade, it seems to result from the

very object of their being so incorporated, that they should have power to accept bills or issue promissory notes; it would be impossible for either of these companies to go on without accepting bills. In the case of Slark v. The Highgate Archway Company, 5 Taunt. 792, the court of common pleas seemed to think that, unless express authority was given by the act establishing the company to make promissory notes eo nomine, a corporation could not bind itself except by deed. Now, there is nothing in the act of Parliament establishing this company, which authorizes them to bind themselves except by deed." So, the authority of this case for the defendant rests solely upon the dubitatur of Bayley and the opinion of Best, that the company could only bind itself by deed. How much, under these circumstances, it is worth, need not be said.

The case of People of State of New York v. Utica Insurance Company, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243, decides, "that, since the act to restrain unincorporated banking associations, (April 11, 1804, re-enacted April 6, 1813,) the right or privilege of carrying on banking operations by an association or company, is a franchise which can only be exercised under a legislative grant; that a corporation has no other powers than such as are specifically granted by the act of incorporation, or are necessary for the purposes of carrying into effect the powers expressly granted; and that the act to incorporate the Utica Insurance Company does not authorize the company to institute a bank, issue bills, discount notes, and receive deposits. Such powers not being expressly granted by the Legislature, and not being within their intention, as collected from the act of incorporation, and that the company having assumed and exercised these powers, they were held to have usurped a franchise."

It is scarcely necessary to enter into an investigation, to show the ground upon which this decision rests. Banking privileges, by an association or company, in New York, rest upon express grant. There was no such grant to the Utica Insurance Company, and an exercise of the power was not necessary and proper to the performance of the purposes for which it is created, but wholly foreign thereto.

In the case of New York Firemen Insurance Company v. Ely, 2 Cow. (N. Y.) 678, it is held that a company incorporated for the purpose of insurance, and forbidden to carry on any other trade or business, also forbidden to exercise banking powers, with a clause in the act incorporating them, enumerating the kind of securities upon which they may loan money, but not including promissory notes in such enumeration, have no power to loan moneys upon promissory notes or any securities other than those especially enumerated. This company being incorporated for the purpose of insurance only, the discounting of promissory notes would have been foreign to the purpose of its creation; but, in addition thereto, it is expressly prohibited from carrying on any other trade or busi-

ness, or exercising banking powers, and the kind of securities upon which it may loan money are especially enumerated, promissory notes being excluded, it is a well-settled maxim of the law, the expressio unius exclusio est alterius; then, for many reasons, this company had no power under its charter to discount notes. It is not only not given expressly or by implication, but upon every principle of legal construction, is withheld.

In the case of Life & Fire Insurance Company v. Mechanics' Fire Insurance Company of New York, 7 Wend. (N. Y.) 31, it is held that "a corporation, authorized to lend money only on bond and mortgage, cannot recover money lent by the corporation, except a bond and mortgage be taken for its re-payment; every other security, as well as the contract itself, is void, and not the basis of action. The reason for this decision is obvious; bond and mortgage being specified as the securities upon which the company might lend money, all others were considered as excluded, upon the principle mentioned above, expressio unius exclusio est alterius.

These are all the cases relied upon by the defendant for the support of the position assumed by him; we are satisfied that they have no applicability to the question, and are not authority in this case.

We are then of opinion (to use the words of Chief Justice Marshall, in the case of McCulloch v. State of Maryland) that the end proposed by the Hiwassee Railroad Company, in executing the note in question, was legitimate, and within the scope of its charter; that as a means it was appropriate, and plainly adapted to that end, which is not prohibited but consistent with the letter and spirit of the charter, and therefore not void, but binding and effectual upon the company and the endorsers.

Let the judgment of the circuit court be reversed, and the case be remanded for a new trial.[17]

BATEMAN v. MID-WALES RY. CO. NATIONAL DISCOUNT CO., Limited, v. SAME. OVEREND, GURNEY & CO., Limited, v. SAME.

(Court of Common Pleas, 1866. L. R. 1 C. P. 499.)

ERLE, C. J.[18] These were actions by the endorsees against the acceptors of several bills of exchange. The defendants pleaded in each action that they did not accept. It appeared that the defendants are a company incorporated by an act of 22 & 23 Vict. c. lxiii. for the purpose of making and working a railway in Wales. The precise

[17] Accord: Grommes v. Sullivan, 81 Fed. 45, 26 C. C. A. 320, 43 L. R. A. 419 (1897), semble; Alton Mfg. Co. v. Garrett Biblical Institute, 243 Ill. 298, 90 N. E. 704 (1909), semble.

[18] Statement of facts sufficiently appears in the opinion of the court.

purposes for which they are incorporated, and the powers which are intrusted to them, are limited and defined by the special act and the provisions of the general acts incorporated therewith. I take it to be well established that a corporation established for a specific purpose cannot bind itself by a contract which is entirely unconnected with the purposes of its incorporation. The question then is, whether this company, being a corporation created for the specific purpose of making a railway, can lawfully bind itself by accepting a bill of exchange. I am of opinion that it cannot. The bill of exchange is a cause of action, a contract by itself, which binds the acceptor in the hands of any endorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad,—or whether, in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on loan beyond their borrowing powers. It would be a pernicious thing to hold that, in respect of the former, the corporation might be sued by an endorsee, but in respect of the latter not.

So much for the general bearing of the question upon principle. How stands the matter as to authority? Subject to three exceptions, I find no case in which an action upon a bill of exchange or promissory note has been sustained against a corporation; and these exceptions prove the rule. In Slark v. Highgate Archway Company, 5 Taunt. 792 (E. C. L. R. vol. 1), the company was empowered by its act of parliament to accept bills for the specific purpose: and in the cases of the Bank of England and the East India Company, the negotiation of bills and notes was within the very scope and object of their incorporation. In no other case that I am aware of has the liability of a corporation ever been enforced. In Broughton v. Manchester Waterworks Company, 3 B. & A. 1 (E. C. L. R. vol. 5), the doctrine I have stated is laid down in general terms: and Bayley, J., entertained a doubt whether the holder of a bill of exchange accepted by a corporation could sue the corporation without showing that the acceptance was given for a purpose for which it was competent to the corporation to accept. That proposition derives much more force when applied to the case of a corporation created for a specific purpose, as we have judicial notice from the act of Parliament that this is. Upon both principle and authority, therefore, I am of opinion that the acceptances given by this company are not binding acceptances, and that the plea is established.[19]

[19] Concurring opinions of Byles and Keating, JJ., omitted.

MONTAGUE SMITH, J. I am of the same opinion. The plaintiffs are endorsees, and not immediate parties to these bills, and therefore cannot recover unless the bills are in their inception valid instruments. I am clearly of opinion that it was not within the competency of this company to accept bills. It is a company incorporated for the formation of a railway, with a limited capital and limited powers of borrowing money. If such a company had power to accept bills of exchange, the consequence would be either that they might bind themselves by acceptances to an unlimited extent, or there must in each case be an inquiry whether the bill was given for the payment of a just debt, or for a purpose not warranted by their incorporation. I think it was not the intention of the legislature that they should accept bills at all. The shareholders advance their money upon the faith of the limited borrowing powers. This limit would be illusory if the directors could be held bound by acceptances. There is no authority to show that they have power to accept, and there is much authority in analogous cases the other way. It has been held that mining companies, waterworks companies, gas companies, salt and alkali companies, and many others, all more in the nature of trading companies than this company, are incapable of drawing, accepting, or endorsing bills of exchange. The first object of a railway company is the making of a railway, though they may and practically always do carry on the business of carriers. That corporations created for the purpose of trading may have power to issue negotiable instruments is the well-known exception. But that applies where the primary object of the incorporation is the carrying on of trade as other persons carry it on, viz. by buying and selling.

In addition to the cases already referred to, there is the distinct authority of many eminent text-writers that a railway company cannot accept. I will refer to one considerable authority, the late J. W. Smith. In his treatise on Mercantile Law, after speaking of the disability of corporations in general to accept bills, he says (7th Ed., by Dowdeswell, pp. 105, 106): "However, it has been considered that a trading corporation may differ from others as to its powers of contracting, and its remedies on contracts relating to the purposes for which it was formed. Thus, such a corporation may in some cases bind itself by promissory notes and bills of exchange; and it was even held that the Bank of England might without deed appoint an agent for such purposes. But a corporation will not have these extraordinary powers unless the nature of the business in which it is engaged raises a necessary implication of their existence." No express power to accept is given to this company; nor is there, in my judgment, any necessary implication from the purposes for which it was created. For these reasons, I am of opinion that the rule in each of these actions should be made absolute.

Rules absolute to enter a nonsuit.

BROWN v. CITIZENS' ICE & COLD STORAGE CO. et al.

(Court of Errors and Appeals of New Jersey, 1907. 72 N. J. Eq. 437, 66 Atl. 181.)

Appeal from the Court of Chancery.

Suit by James Brown against the Citizens' Ice & Cold Storage Company and another to foreclose a mortgage. From a decree for complainant, defendant the Pennsylvania Iron Works Company appeals.

The opinion of BERGEN, V. C., is as follows:

"The defendant company gave two mortgages, one for $10,000 to the complainant, another for $7,235 to Annie Lisle Ballingall, which she assigned to the complainant. There is no dispute about the amount of the loans, nor that they represent debts due by the company, but the defendant insists that under the terms of defendant's charter, as expressed in the following words: 'And the doing of any other act or acts, thing or things, incidentally to grow out of, or connected with said business or any part or parts thereof; to issue bonds secured by mortgage or mortgages upon the property, and franchises of said corporation, and to sell the same for the purpose of raising money, with which to erect machinery, and otherwise to improve said lands'—the corporation had no authority to mortgage its property, other than for the purposes above stated, and as the money, to secure which the two mortgages were given, was not applied to the payment of debts due for 'machinery and otherwise to improve said lands,' the mortgages are ultra vires, and cannot stand as incumbrances on the land.

"In my opinion, the general power given a corporation, under our act, to mortgage its property, is not restricted by the terms of the charter invoked. That clause has reference alone to the issuing of bonds in the usual commercial form, of a negotiable character, to be sold and passed by delivery, and was not intended to, and does not, prevent the corporation from securing to a creditor its debt by way of mortgage, in common form; and the power to do so is fully conferred by the clause in the charter, which authorizes the company 'to do any act or thing incidentally to grow out of or in connection with said business,' implying the right to borrow money and pledge its property as security. The complainant is entitled to a decree."

PER CURIAM. The decree appealed from in this case is affirmed, for the reasons stated in the opinion filed in the Court of Chancery by Vice Chancellor BERGEN.[20]

[20] See Aurora Society v. Paddock, 80 Ill. 264 (1875).

CHADWICK v. OLD COLONY R. CO.

OLD COLONY R. CO. v. CHADWICK.

(Supreme Judicial Court of Massachusetts, 1898. 171 Mass. 239, 50 N. E. 629.)

Case reserved and appeal from superior court, Dukes county.

Action by Edward W. Chadwick, assignee of Joseph M. Wardwell, against the Old Colony Railroad Company, to recover money paid for a note and mortgage. There was a judgment for defendant in the superior court. Affirmed.

The second case is an appeal by Edward W. Chadwick from the decree of the court of insolvency directing a sale of a railroad on the petition of defendant. Appeal dismissed.

KNOWLTON, J.[21] The first of these actions is brought to recover the sum of $10,000, with interest, paid by Joseph M. Wardwell to the defendant. Wardwell is an insolvent debtor, and the plaintiff is his assignee. The payment was made under an agreement whereby Wardwell became the purchaser from the defendant of a note given by the Martha's Vineyard Railroad Company to the defendant, secured by a mortgage on the property and franchises of this railroad company. The note and mortgage were given in pursuance of the provisions of St. 1874, c. 351, § 4, which authorizes a railroad corporation to aid in the construction of any "connecting railroad within the limits of this commonwealth, whether connected by railroad or steamboat lines, by subscribing for shares of stock in such corporation, or by taking its notes or bonds, to be secured by mortgage or otherwise, as the parties may agree." There is no dispute that the Martha's Vineyard Railroad Company was connected with the Old Colony Railroad Company by a steamboat line, and that the Old Colony Railroad Company was authorized by the statute to aid in the construction of the railroad of the other corporation to the amount of the note, which was for $36,000, payable in 10 years after date, with interest semiannually at 7 per cent. per annum, and that it furnished money to that amount for that purpose.

The only questions raised in regard to this transaction are as to the form of the note and the form of the mortgage, the note being in terms negotiable, and the mortgage containing a power to the mortgagees to sell the property and franchises at auction for a breach of the condition of the mortgage. The mortgage was made to two individuals as trustees for the defendant. On January 18, 1890, more than 15 years after the mortgage was given, the defendant entered into an agreement with Wardwell in consideration of $5,000 paid by him on that day, and $5,000 more to be paid on May 19th of the same year, and $26,000 to be paid on January 1, 1895, with interest at 5 per cent., to transfer and deliver the note to him, or to such

[21] A part of the opinion is omitted.

persons as he might, in writing, request; and the trustees agreed in the same writing that upon the transfer and delivery of the note they would assign the mortgage to the person to whom the vote was transferred and delivered. It was also agreed that, until the payments should all be made, the defendant should hold the note, and the trustees should hold the mortgage, and enforce it for his benefit in such manner as he might, in writing, request. Wardwell made the second payment of $5,000, but failed to pay the balance. To recover the sum of $10,000, made up of these two payments, and also the interest, the plaintiff brings this suit, contending that the agreement was illegal and void. His contention is, in substance, that such a mortgage as the statute authorizes could not give a title to the road that could pass by a foreclosure or otherwise to the hands of any natural person, or to any railroad company except the one which aided in the construction by taking the notes or bonds. * * *

The questions raised in the action at common law involve a consideration of the rights of mortgagees of railroads. Our statutes authorize railroad corporations to mortgage railroads in certain cases, but they do not particularly define the rights of the mortgagees. Pub. St. c. 112, §§ 61–80. The general language used implies that their rights are like those of mortgagees of other kinds of property, except so far as they are affected by the provisions of the statutes for the management or use of the property.

It has sometimes been contended that the franchises of a corporation cannot be conveyed by mortgage in connection with its property. It is true that the franchise to be a corporation is not assignable, or in any way transferable. The distinction between the franchise to be a corporation and the franchise to use the corporate property for the purposes for which the corporation was organized was pointed out by Mr. Justice Curtis in Hall v. Railroad Co., Fed. Cas. No. 5,948, and has been recognized many times by courts of high authority.

In Memphis & L. R. R. Co. v. Railroad Com'rs, 112 U. S. 609–619, 5 Sup. Ct. 299–303 (28 L. Ed. 837), the court says: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such, and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation."

In the opinion in New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 501–509, 5 Sup. Ct. 1009–1013 (29 L. Ed. 244), is this language: "The authority to mortgage the franchises of a railroad company

necessarily implies the power to bring the franchises so mortgaged to sale, and to transfer them with the corporeal property of the company to the purchaser. It could not be held that when the mortgage of a railroad and its franchises was authorized by law that the attempt of the mortgagor to enforce the mortgage would destroy the main value of the property by the destruction of its franchises."

In Bank v. Edgerton, 30 Vt. 182, 190, it is said that: "The right to build, own, manage, and run a railroad, and take the tolls thereon, is not of necessity of a corporate character, or dependent upon corporate rights. It may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable."

A similar doctrine has been stated or recognized in many other cases. See Morgan v. Louisiana, 93 U. S. 217–223, 23 L. Ed. 860; Trask v. Maguire, 18 Wall. 391–409, 21 L. Ed. 938; Railway Co. v. Miller, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. Ed. 121; Jackson v. Ludeling, 21 Wall. 616, 22 L. Ed. 492; Id., 99 U. S. 513, 25 L. Ed. 460; State v. Sherman, 22 Ohio St. 411–428; Meyer v. Johnston, 53 Ala. 237–327; Chaffe v. Ludeling, 27 La. Ann. 607; Willink v. Banking Co., 4 N. J. Eq. 377.

So far as we are aware, the cases bearing upon the subjects all hold that a mortgage of a railroad and other property of a railroad corporation includes the franchise to use the property for the purposes for which it is held by the corporation. This right will pass to a purchaser at a foreclosure sale, whether the sale is to a corporation or to an individual. A mortgage of property necessarily implies the right in the mortgagee to make the property valuable. This may be either by a sale or by use. There is no good reason why the right to sell should be restricted to cases in which an existing railroad corporation is willing to become the purchaser. With such a restriction a mortgage on the property and franchises of a railroad ordinarily could only be made available through an actual use by the mortgagee, or through a contract under Pub. St. c. 112, § 66, with the mortgagor.

By Pub. St. c. 151, § 2, the supreme judicial court is given jurisdiction "of all cases arising out of railroad mortgages." In Troy & G. R. Co. v. Com., 127 Mass. 43, it is said that chapter 140 of the General Statutes (Pub. St. c. 181) relates only to mortgages of real estate, and it is implied that the only jurisdiction to foreclose mortgages upon railroads is in equity. We think there is no doubt that a court of equity, under our statutes, has jurisdiction over suits to foreclose mortgages of railroads, and in such cases may order a sale of the property and franchises covered by the mortgage.

The right to foreclose such a mortgage by a sale, and the right of an individual as well as a corporation to purchase at the sale, and to transfer to others the title which he acquires, is recognized by St. 1886, c. 142, § 1, which is as follows: "A purchaser of a railroad at

a sale under a valid foreclosure of a legal mortgage thereof and his grantee and successors in title, shall be subject to all and the same duties and liabilities, restrictions and other provisions respecting such railroad, or arising from the construction, maintenance and operation thereof, and have all and the same powers and rights relating to said railroad and the construction, maintenance and operation thereof which the corporation by which said mortgage was made was subject and had at the time of said sale."

This statute is declaratory of the law as it exists without legislation in other jurisdictions, and as doubtless it would have been held to be in this commonwealth upon general principles before the enactment of the statute. It follows that the agreement under which the payments were made by Wardwell was not contrary to public policy, and it gave him equitable rights in the mortgaged property and franchises that furnish a valuable consideration for his payments. It also follows that the original mortgage was not illegal in that it was made to secure a negotiable promissory note.

The effect of a power of sale inserted in a mortgage of a railroad, it is not necessary in this suit to determine, inasmuch as the validity of the payments made by Wardwell under the agreement does not depend upon it. Powers of sale in mortgages have been recognized by the courts and by the statutes in this commonwealth for many years; and, if they are not objectionable in terms, we see no reason why they should not be given effect in mortgages of railroads as well as of other property.

The fact that St. 1874, c. 351, § 4 (Pub. St. c. 112, § 80), in authorizing the making of mortgages of railroads, does not expressly mention their franchises, is immaterial. The franchise to use the railroad and its appurtenances goes with the railroad by implication when an entire railroad is conveyed. That a mortgage can be made originally only to a connecting railroad under this statute does not indicate that the mortgagee can make it available only by operating the railroad, and that the franchises cannot be used by a purchaser. So to hold would put a limitation upon the mortgage for which there is no warrant in the statute.

The grounds upon which the plaintiff seeks to recover are untenable. Judgment for defendant. Appeal dismissed.

AMERICAN LOAN & TRUST CO. v. GENERAL ELECTRIC CO.

(Supreme Court of New Hampshire, 1901. 71 N. H. 192, 51 Atl. 660.)

Bill in equity to restrain the General Electric Company, a judgment creditor of the Concord Electric Company, from completing a levy on property of the latter company mortgaged to the American Loan & Trust Co. Facts agreed. Case transferred on a special

question. The Concord Electric Co. was organized to take over the property and franchises of the Concord Land & Water Power Co. The mortgage in question was executed to the American Loan & Trust Co. to secure a bond issue made to pay the purchase price in part, receivers' charges and for betterments. The bonds are all in the hands of investors.[22]

CHASE, J. The power of private corporations generally to secure the payment of their debts by a mortgage of their property is not denied; but it is alleged that the Concord Electric Company is a quasi public corporation, and, being such, cannot mortgage or otherwise alienate its franchises and the property required for the performance of its public duties without the assent of the legislature. According to the weight of authority, measured by the number of the cases, quasi public corporations have this disability. 4 Thomp. Corp. §§ 5352, 5355, and authorities cited. Whether the reasons upon which the doctrine rests are sufficient to support it has been seriously questioned. 3 Cook, Corp. 1782a; Miller v. Railroad Co., 36 Vt. 452; Shepley v. Railroad Co., 55 Me. 395, 407; Kennebec & P. R. Co. v. Portland & K. R. Co., 59 Me. 9; Hunt v. Gaslight Co., 95 Tenn. 136, 31 S. W. 1006. The doctrine has been approved in this state in respect to railroad corporations. Pierce v. Emery, 32 N. H. 504; Richards v. Merrimack & C. R. R., 44 N. H. 127; State v. Hayes, 61 N. H. 264, 324.

Whether the secondary franchises of a quasi public corporation—the franchises other than that of being a corporation—and the property required for the fulfillment of the public purposes of the corporation may be mortgaged depends upon the terms upon which the franchises are granted, "or, in the absence of anything special in the grant itself, upon the intention of the legislature, to be deduced from the general purposes it had in view, the means it intended to have employed to execute those purposes, and the course of legislation on the same or similar subjects; or, as it is sometimes compendiously expressed, upon the public policy of the state." Hall v. Railroad Co., Fed. Cas. No. 5,948.

The Concord Electric Company was formed under the general law of the state. This provides that any five or more persons of lawful age may associate together by articles of agreement to form a corporation for certain specified purposes, and for "the carrying on of any lawful business except banking, life insurance, the making of contracts for the payment of money at a fixed date or upon the happening of some contingency, and the construction and maintenance of railroads." Pub. St. c. 147, § 1. When the articles are recorded as required, and the charter fee, if any, is paid, the signers become a corporation, "and such corporation, its officers and stockholders, shall have all the rights and powers and be subject to all the duties

[22] Statement of fact substituted.

and liabilities of other similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter." Id. § 4. Among the powers expressly granted to such corporations is the power to make "contracts necessary and proper for the transaction of their authorized business," and to "purchase, hold, and convey real and personal estate necessary and proper" for such purpose, not exceeding the amount authorized by their charter or by statute. Id. c. 148, §§ 8, 9.

One reason that has been assigned for the nonvendibility of a quasi public corporation's franchises and property without the special assent of the legislature is that the state, in granting the corporate powers, relies more or less upon the ability and character of the persons to whom the grant was made for accomplishing the public purposes in view. If this is a sound reason in any case (Miller v. Railroad Co., 36 Vt. 452, 492; Shepley v. Railroad Co., 55 Me. 395, 407; 4 Thomp. Corp. § 5352), it certainly is not in the case of a corporation formed under the general law of this state. The state has no part in determining who the members of the corporation shall be, other than that they shall be of lawful age. Any five persons of lawful age may become a corporation by force of their own acts in making the agreement, causing it to be recorded, and paying the required charter fee. After the corporation is organized, and its capital stock is paid in, the stockholders are liable to constant change by transfers of stock in various ways. The grant of corporate powers under these circumstances is not in any sense a personal trust. Threadgill v. Pumphrey, 87 Tex. 573, 578, 30 S. W. 356.

The only special privilege which the Concord Electric Company acquired by its incorporation was the right to be a corporation. The power of eminent domain was not delegated to it, it was not exempted from taxation, nor was it granted a monopoly of furnishing electric lights to the city and its inhabitants. It was granted no other or greater power in respect to its proposed business than a natural person would have in the prosecution of the same business. It acquired the right to construct lines of wire in highways of the city not by virtue of its incorporation, but by virtue of licenses granted by the mayor and aldermen. The statute provides that "telegraph, telephone, electric light, and electric power poles may be erected and maintained in any public highway, and the necessary wires may be strung on such poles or placed beneath the surface of such highway by any person or corporation as provided in this chapter, and not otherwise." Pub. St. c. 81, § 1. It further provides that the selectmen, or, in case of a city, the mayor and aldermen (Id. c. 48, § 14), upon petition of any person or corporation, may locate the routes of lines of wire and grant licenses therefor for such a period of time as they deem expedient, may change the terms and conditions of the licenses from time to time, and may revoke the same whenever the public good requires. If a person is damaged in his estate by a

license or any act done under it, he may have his damages assessed by the selectmen. Appeals from the decisions of selectmen to the superior court are allowed in certain cases. Id. c. 81, §§ 2–9.

These provisions were designed to regulate and control the use made of highways for such purposes, so that such use will not unduly interfere with the other public uses to which the highways are dedicated. A license under these provisions is not a grant of a franchise, but a mere permission to use highways, subject to limitations and constant control and regulation by public officers. People v. Gaslight Co., 38 Mich. 154, 155; Commercial Electric Light Co. v. City of Tacoma, 17 Wash. 661, 672, 50 Pac. 592. So far as the operation of the provisions is concerned, it does not matter who the licensee may be for the time being. If a license was granted to the Concord Land & Water Power Company, and the Concord Electric Company, as the vendee of the property, rights, and franchises of that company, is now operating the electric light plant, its use of the highways may be regulated and controlled under these provisions, the same as if there had been no change in the ownership of the plant. If the transfer of the property had the effect to revoke the license, the statute provides a way for obtaining a renewal. Id. c. 81, § 18.

The statute further provides that "all telegraph, telephone, and electric light companies serving parties for hire shall be deemed to be public, and shall reasonably accommodate persons wishing to enjoy their facilities without discrimination and at reasonable rates." Pub. St. c. 81, § 13. In the original act, of which chapter 81 of the Public Statutes is a revision, the corresponding provision relating to electric light companies reads as follows: The "proprietors of any electric lighting apparatus or lines shall furnish the means of lighting by such electric light to all persons within reach thereof and applying therefor upon similar terms and conditions without discrimination and at reasonable rates." Laws 1881, c. 54, § 12. The words "electric light companies" in the revised section were evidently intended to describe the same parties as the words "proprietors of any electric lighting apparatus or lines" in the original section, and to include natural persons as well as corporations. This provision imposes certain duties in behalf of the public upon the corporation or natural person engaged in the business of furnishing electric lights for hire and making use of highways in the business. By virtue of it, and also in consideration of the license to make use of highways, the corporation or natural person assumes an obligation to the state to carry on the business faithfully and impartially so far as the public are concerned. While the obligation is personal so long as the corporation or person holds the property used in its performance, it passes with the property to a vendee, and must be assumed by the latter.

The Concord Electric Company is under the same obligation to furnish electric lighting facilities to the public at reasonable rates and without discrimination as was the Concord Land & Water Pow-

er Company. It succeeded that company in the business and the ownership of the plant, and the statute now applies to it the same as it formerly did to the Water Power Company. The state relies for a fulfillment of the public purposes in view, not upon its confidence in particular persons, but upon statutory provisions defining the duties of persons engaged in the business and regulating their conduct. Although a corporation or a person becomes incapacitated for performing the public duties and obligations pertaining to the business by disposing of the property and franchises used in it, the public purposes are not thereby defeated. All the public duties and obligations pertaining to the business follow the property and franchises into the possession of whomsoever they go, and attach to their owners for the time being. Under these circumstances public policy does not require that such corporations should be disabled from alienating their property and franchises.

But there is another consideration that seems conclusive. A natural person may engage in the business of furnishing electric lights for hire, and acquire all the privileges and be subject to all the duties and obligations pertaining to the business as provided in the statute. There can be no doubt that a person so engaged is at liberty to dispose of his business and property at pleasure. The fact that the legislature have placed a corporation engaged in the business of electric lighting upon the same footing in all respects as a natural person shows that they understood and intended that a corporation of this kind should have equal freedom as to the disposition of its property and rights.

It is not difficult to see why the legislature adopted this course. A policy that would deprive an electric light corporation of the power of selling out its business and property when it becomes financially embarrassed, or of raising money to carry on the business by a pledge of its property and franchises, would tend to defeat the fulfillment of its public purposes. A corporation so hampered might be worse than useless to its stockholders and the public. It might not be able either to use its property and franchises, or to transfer them to others for use. "It is said, if a corporation is permitted to dispose of its franchises and of its property essential to their exercise, it will disable itself from performing its obligations to the public. It might seem to be an answer in point that, unless it is permitted so to do, it will never have any ability to perform those obligations." Miller v. Railroad Co., 36 Vt. 452, 491.

Nor is it apparent how unsecured creditors of a corporation could avail themselves of the property and franchises to pay their debts. The policy that would disable the corporation from pledging its property and franchises for its indebtedness would prevent them from being taken by judgment creditors upon a levy. 4 Thomp. Corp. § 5364; 6 Thomp. Corp. § 7853. All the supposed evils attending the substitution of another person or corporation for the original cor-

poration would arise if the property and franchises were transferred by a levy, the same as if they were transferred by the foreclosure of a mortgage or by a sale. For example, how would the public be any better off by a transfer of the Bridge street station and its apparatus —property that is indispensable to the business—to the General Electric Company by a levy than it would be by a transfer to other persons upon a foreclosure of the mortgage to the American Loan & Trust Company?

The right to sell or pledge property is one of the principal rights pertaining to ownership, and one that is generally essential to enable the owner to use the property in business successfully. The policy adopted by the state, so far as electric light corporations are concerned, allows this right to remain unimpaired, and secures the assurance that corporations will fulfill their public duties by providing for a regulation of their use of the property. It regards mortgages of the property and franchises of such corporations, made to secure debts incurred in their authorized business, as contracts or conveyances "necessary and proper for the transaction of their authorized business," as well as necessary and proper for the fulfillment of their obligations to the public.

There are general laws which expressly authorize railroad corporations and street railway corporations to incur debts and secure their payment by mortgages of their property and franchises. Laws 1897, c. 71, § 1; Laws 1895, c. 27, §§ 16, 17; Laws 1897, c. 74, § 1. During the past 10 years 14 electric light companies have been incorporated in this state by special charters, and each of them was expressly authorized to mortgage its property and franchises. Laws 1893, cc. 201, 227, 273, 303; Laws 1897, cc. 144, 172, 173, 184, 202, 203, 206; Laws 1899, cc. 208, 218; Laws 1901, c. 243. Five acts have been passed authorizing the consolidation of electric light companies, each of which expressly gave the consolidated corporation like authority. Laws 1897, c. 137; Laws 1899, c. 164; Laws 1901, cc. 189, 195, 276. The charters of three corporations previously granted have been amended by introducing into them authority of this kind. Laws 1893, cc. 177, 193, 301.

It is said by the defendants upon their brief that of 98 special charters granted by the legislature since 1887 to gas, electric light, electric railway, water, aqueduct, telephone, and telegraph companies 80 have contained authority to mortgage the corporation's property or property and franchises. This legislation all tends very strongly to prove the existence of a public policy in this state which allows quasi public corporations—even railroad corporations—the same freedom to incur debts and pledge their property and franchises therefor that is possessed by other corporations and by natural persons. Whatever the public policy may be in respect to other corporations, no doubt is entertained that it allows electric light and power corporations, formed under the general law, and making use of public highways for

stringing wires under licenses granted by selectmen, to alienate or mortgage their property and secondary franchises.

Accordingly it is held that the Concord Electric Company has power to mortgage its property and franchises. In other states similar views have been taken under similar conditions. City of Detroit v. Gaslight Co., 43 Mich. 594, 5 N. W. 1039; Hunt v. Gaslight Co., 95 Tenn. 136, 31 S. W. 1006; Hays v. Coal Co., 29 Ohio St. 330; Evans v. Heating Co., 157 Mass. 37, 31 N. E. 698.

Case discharged. All concurred.[23]

NORTH SIDE RY. CO. et al. v. WORTHINGTON et al.

(Supreme Court of Texas, 1895. 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778.)

Suit by Worthington and others against the North Side Railway Company, the Ft. Worth City Company, and others, on certain bonds issued by the two companies and secured by a mortgage on their joint property. Both corporations were organized by the same parties, and in furtherance of a plan of suburban development. Both companies were organized under general incorporation laws; the railroad company being authorized to construct and operate street railways, and the City Company to purchase, subdivide, and sell lands in cities and villages.[24]

GAINES, C. J.[25] * * * It is contended on behalf of the plaintiffs in error that the execution of the bonds was ultra vires, and that, therefore, they are void. In determining this question, we may recur to a few leading principles. Corporations are the creatures of the law, and they can only exercise such powers as are granted by the law of their creation. An express grant, however, is not necessary. In every express grant there is implied a power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. The difficulty arises in any particular case whenever we attempt to determine whether the power of a corporation to do an act can be implied or not. The question has given rise to much litigious controversy and to much conflict of decision. * * * If the means be such as are usually resorted to, and a direct method of accomplishing the purpose of the incorporation, they are within its powers. If they be unusual, and tend in an indirect manner only to promote its interests, they are held to be ultra vires. * * *

As illustrative of the principle which we have announced, we call attention to some cases in addition to those already cited. In Davis

[23] Accord: Bardstown & L. R. Co. v. Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541 (1862).

[24] Statement of facts substituted.

[25] A part of the opinion is omitted.

v. Railroad Co., 131 Mass. 258, 41 Am. Rep. 221, it is held that it is beyond the powers of a railway company, or of a corporation organized under the General Statutes of Massachusetts for the manufacture and sale of musical instruments, to guaranty the payment of the expenses of a musical festival. The opinion in that case is by Chief Justice Gray, and is a very able and exhaustive discussion of the question. In Pearce v. Railroad Co., 21 How. 441, 16 L. Ed. 184, it was held that two railroad companies which had consolidated were not authorized to establish a steamboat line to run in connection with their railroads. In Railroad Co. v. Colwell, 39 Pa. 337, 80 Am. Dec. 526, it was decided that a railway company was not authorized by its charter to maintain a canal. In Tomkinson v. Railway Co., 35 Ch. Div. 675, it was held that a proposed subscription by the company to an institution known as the "Imperial Institute" was not prevented from being ultra vires by the fact that the establishment of the institute might benefit the company by causing an increase of passenger traffic over their line."

To these cases others might be added, but they are sufficient to illustrate the doctrine that a corporation created for the purpose of carrying on a business, under a statute, which merely states the nature of the business, and does not further define its powers, may exercise such powers as reasonably necessary to accomplish the purpose of its creation, and it may be such as are usually incidental in practice to the prosecution of the business, and no more. See Lime Works v. Dismukes, 87 Ala. 344, 6 South. 122, 5 L. R. A. 100; Searight v. Payne, 6 Lea (Tenn.). 283.

These principles, applied to the facts of this case, lead to the conclusion that neither the Ft. Worth City Company nor the North Side Street-Railway Company had the power to extend its credit to foster the interests of the other company. Viewed in the light of the peculiar facts of the case, it is apparent that the building up and settlement of the suburb tended to increase the business of the street railway which connected that suburb with the city of which it was the outgrowth. On the other hand, it is equally clear that the establishment of the street railway tended to promote the enterprise of the other corporation. It is also clear that the establishment and maintenance of a street railway is not an object which was expressed in the articles of incorporation of the City Company, and that the building up an addition to a city is not a purpose expressed in the charter of the other corporation. That the success of the one enterprise tended to promote the success of the other was not itself sufficient to authorize the one corporation to aid the other, for the reason that the benefit which was to accrue was not the direct result of the means employed.

The transaction in controversy, when properly analyzed and stripped of its form, is one in which the two corporations agreed to borrow a sum of money, to be divided between them, and that each

should become the surety for the other for the amount received by such other. It is too well settled to require the citation of authority that a corporation of the character of those in question, in the absence of statutory authority, cannot bind itself by accommodation paper executed for the benefit of another party. It follows that, if either corporation in this case is to be held bound for more than its proportionate amount of the debt incurred, it must be upon the ground that it had power to aid in the prosecution of the business of the other.

Did the street-railway company have such power? If it is to be held that, because of the indirect benefits which would result to it from the success of the enterprise, it was authorized by the law to aid in building up the suburb of the City Company, then it should also be held that it had the power to employ its funds and its credit in fostering any other undertaking which was calculated to increase the population of the city of Ft. Worth, or of any portion of the territory which lies along its line. The effect of that ruling would be to empower every business corporation, not only to carry on the very business it was created to prosecute, but also to engage in every enterprise which would tend to increase the volume of its principal business, and the revenues to be derived therefrom. This would leave the scope of its operations without any reasonable limit. That such is not the law, the authorities already cited are sufficient to show. Street railways are projected for the carriage for hire of people living within and near cities and towns. Street-railway companies are chartered for the specific purpose of establishing and operating street railways, and not to increase the population of the towns and cities through which they are established, though their operation may have that effect, and though an increase of population may result indirectly to their benefit.

The same principles apply to the case of the Ft. Worth City Company. The general law in force at the time this corporation was created provided that a private corporation might be formed for the purpose, among others, of "the purchase, subdivision, and sale of lands in cities, towns, and villages." See Laws 1885, p. 59. We construe this to give the power to purchase lands, and to lay them off into streets, blocks, and lots, and to sell them in subdivisions for the purpose of profit. Many enterprises suggest themselves which might be entered into by such a corporation, which would tend to promote the success of the undertaking. As a general rule, there is probably none that would be better calculated to produce that effect than the construction and maintenance of an ordinary railroad. But can it be said that such a corporation has the power to embark its capital in such an enterprise? A limit must be laid down as to the implied powers of a corporation; and, with reference to a company chartered for a business purpose, we think the proper line of demarkation is between those powers which are reasonably necessary to the busi-

ness, or which are usually incident to its prosecution, and those which are not.

It occurs to us that, in determining the powers of a corporation, a distinction should be observed between such as are created by special charters and such as come into existence by virtue of authority conferred by a general law. A charter is in the nature of a contract, and it may be that, in construing a special charter, we should construe it in the light of the special circumstances attending the enterprise which was intended to be promoted; as, in case of a railroad, its connection with other lines of transportation, whether by water or land, or its terminus at a seaport. The last-mentioned circumstance seems to have had a controlling influence upon the court in the case of Railway Co. v. Redmond, 10 C. B. (N. S.) 675, already cited. For example, if the legislature had the power to grant and had granted a special charter to the City Company, and it had appeared that a street railway was necessary to the success of the corporation, and that this fact was known, it may be that the power to construct, or at least to aid the construction of, the street railway, would have been implied. But, this corporation having been created under a general law, we do not see that it can claim the right, by reason of its peculiar surroundings, to exercise a power which another like corporation could not exercise by reason of different circumstances. Our constitution provides that corporations shall be created only by general laws, and it would seem that one purpose of the provision was to prevent the legislature from granting to one corporation special powers or special privileges. At all events, the general law, as we think, should be construed as a general rule, conferring upon each member of each particular class of corporations precisely the same powers.

Cities and towns have grown up without the aid of street railways. The origin of the latter is comparatively very recent. The law does not recognize them as a usual means of carrying out the purpose of a corporation organized to purchase and subdivide lands, and to sell them in lots. They are provided for in the general law as a distinct purpose for which corporations may be created. The two enterprises may be of mutual assistance; and if the same persons desire to form two distinct corporations for the prosecution at the same time of two undertakings, with a view to the mutual benefit which may result from the concurrent operation of the two, no reason is seen why they should not do so. But each should confine itself to its proper business, and should not divert its capital or extend its credit to the assistance of the other.

In the case of Ft. Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167, the supreme court of the United States held that the contract of the City Company to contribute to the construction of a bridge across a river which separated its lands from the city of Ft. Worth was not ultra vires. The court say:

"The object of the creation of the corporation was the acquisition and sale of lands in subdivision, and it cannot be successfully denied that the object would be directly promoted by the use of legitimate business methods to render the lands accessible. This involved the expenditure of money or the assumption of liability; but there is no element in this case of any unreasonable excess in that regard, or the pursuit of any abnormal and extraordinary method." The same can hardly be said of the transaction developed in the present case. The argument of the court draws a line between such ordinary means as are generally necessary to carry out the purposes of the corporation and such as are abnormal and extraordinary. We think the powers attempted to be exercised by the two corporations in this case, and now in question, fall within the latter class. * * *

The judgment is reversed, and the cause remanded.

TIMM v. GRAND RAPIDS BREWING CO.

(Supreme Court of Michigan, 1910. 160 Mich. 371, 125 N. W. 357, 27 L. R. A. [N. S.] 186.)

HOOKER, J. The defendant is a corporation engaged in the business of manufacturing and selling all kinds of malt and fermented liquors. The declaration alleges that it made a practice of furthering its business by aiding such keepers of saloons as purchased its product in obtaining sureties upon their bonds required by law; that in April, 1906, the defendant owned a hotel including a bar with fixtures and equipment designed for the retail liquor trade, and it desired to have such a business conducted there by one Carrel, and, to induce the plaintiff to become one of the sureties upon the bond required by the state of said Carrel, promised to indemnify the plaintiff against loss thereby and in accordance with such promise executed and delivered to the plaintiff a bond of indemnity set forth in the declaration; that Carrel entered upon said business and subsequently a judgment upon the bond executed by the plaintiff was rendered against Carrel and heirs, and execution was issued thereon, and plaintiff was compelled to and did pay said judgment. It alleges further the liability of defendant and its duty to reimburse plaintiff, and its refusal to do so. The defendant demurred to plaintiff's declaration on the ground that the execution and delivery of said bond of indemnity was beyond the power of defendant, being outside of the scope of the business for which defendant was organized, and that the promise was ultra vires and the bond void. Upon the argument in this court, it was also claimed that the bond was void because against public policy. The demurrer being overruled, the cause is before us on certiorari.

The purpose for which the "Brewing Co." was organized was stated in its articles to be "the manufacture and sale of malt and all

kinds of malt and fermented liquors and aërated and charged waters." Under the well-settled rule the defendant had implied power to do those things necessary and helpful to the conduct of its authorized business. It could itself engage in the sale at retail of its product in as many places as it might desire, and therefore might contract with its own sureties requisite to such business, and in our opinion it might also render assistance to purchasers of its product in furtherance of a contract for such purchase. Thus it has been held that the guaranty of the performance of the covenants in a lease by a saloon keeper was a contract within the power of a brewing company. See Aaronson v. Brewing Co., 26 Misc. Rep. 655, 56 N. Y. Supp. 387. The same was held of a guaranty of payment of rent by one of the brewing company's customers. Winterfield v. Brewing Co., 96 Wis. 239, 71 N. W. 101. Also of the guaranty of payment of notes given by a saloon keeper to enable him to commence business. Blue Island Brewing Co. v. Fraatz, 123 Ill. App. 26; Standard Brewery v. Kelly, 66 Ill. App. 267; Keeley Brew. Co. v. Emrick, 64 Ill. App. 247. It has also been held that the signing a saloon keeper's bond as surety was not an ultra vires act. Horst v. Lewis, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460. See, also, Kraft v. W. S. Brew. Co., 219 Ill. 205, 76 N. E. 372.

In Best Brewing Co. v. Klassen, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26, the Supreme Court of Illinois held that the signature of an appeal bond for a defeated defendant in a forcible entry case was an act that was ultra vires under articles which showed the corporation signing the bond to have been organized to manufacture and sell beer, ale, and porter and to carry on a general brewing business in all its branches. The opinion states that there was no evidence tending to prove that the business of the corporation had been or was ever likely to be benefited in any degree by the execution of the bond. In a later case the same court held that loaning money to enable a borrower to erect a building in which he promised to sell only the beer manufactured by the corporation loaning the money was not ultra vires. The case is distinguished from the Klassen Case in the opinion. See Kraft v. Brewing Co., 219 Ill. 205, 76 N. E. 372. The foregoing and other cases cited by counsel sufficiently indicate the application of the general rule as to implied powers to such cases as the present.

Furthermore, the great weight of authority sustains the claim of the plaintiff's counsel that the defendant is estopped from denying its liability on the ground that the act was ultra vires. In Sav. Bank v. Elevator Co., 90 Mich. 550, 51 N. W. 641, 30 Am. St. Rep. 454, we said: "The plea of ultra vires should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong." See, also, Coit v. Grand Rapids, 115 Mich. 493, 73 N. W. 811; Rehberg v. Tontine Surety Co., 131 Mich. 135, 91 N. W. 132;

Citizens' Sav. Bank v. Globe Brass Works, 155 Mich. 9, 118 N. W. 507.

Counsel's contention that the giving of this bond is contrary to public policy is perhaps a proper suggestion to be considered for its bearing upon the questions already discussed. We are of the opinion, however, that it is not controlling. The sale of beer was lawful, and, while restricted to persons or companies giving the statutory bonds, there is nothing to justify the inference that one may not hire or indemnify lawful bondsmen, or that the implied powers of the corporation are restricted or the rule relating to ultra vires acts affected thereby.

The order of the learned judge of the superior court is affirmed.[26]

MOORE, MCALVAY, and STONE, JJ., concur.

OSTRANDER, J. I think the business of becoming surety upon saloon keepers' bonds ultra vires the powers of defendant. I concur in the result upon the ground that defendant is estopped to urge the defense of ultra vires.

MALLORY et al. v. HANAUR OIL-WORKS.

(Supreme Court of Tennessee, 1888. 86 Tenn. 598, 8 S. W. 396.)

LURTON, J.[27] This is an action of unlawful detainer, brought by the Hanaur Oil-Works, a corporation created under the general incorporation act of 1875, and engaged in the manufacture of cotton-seed oil at Memphis, Tenn. The facts which raise the question to be determined are these:

In July, 1884, a contract was entered into by and between four corporations engaged in manufacturing cotton-seed oil at Memphis, for the formation of what is designated in the agreement as a "combination," "syndicate," and partnership. The contracting mills agreed to select a committee, composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each mill, to be managed and operated by this committee, through officers, agents, and employés selected by them, for the common benefit; the profits and losses of such operation to be shared in propor-

[26] Accord: Koehler & Co. v. Reinheimer, 26 App. Div. 1, 49 N. Y. Supp. 755 (1898); Railway Co. v. Howard, 7 Wall. 392, at 412, 19 L. Ed. 117 (1868); Winterfield v. Cream City Brewery Co., 96 Wis. 239, 71 N. W. 101 (1897); Hess v. W. & J. Sloane, 66 App. Div. 522, 73 N. Y. Supp. 313 (1901), on appeal 173 N. Y. 616, 66 N. E. 1110 (1903).

In Appleton v. Citizens' Central Nat. Bank, 190 N. Y. 417, 83 N. E. 470, 32 L. R. A. (N. S.) 543 (1908) the court (Cullen, C. J.), in passing on the liability of a bank guaranty of a loan to its debtor, said: "We think, however, that the defendant's power to guarantee was limited by the extent of its interest in the subject-matter of the guaranty. To allow a bank to guarantee the payment by one of its debtors of a larger sum in order that the bank might receive or retrieve a lesser sum would be to permit it to enter upon very hazardous speculation, and authorize very wild and unsafe banking."

[27] A part of opinion relating to ultra vires is omitted.

tions agreed upon. This arrangement was to last one year, but, with consent of all, might be renewed for two additional years; and, as appears, was at the end of the first year renewed for two other years, terminating August 1, 1887.

The facts clearly establish that the possession of the several mills was turned over to this executive committee, and they were operated by these managers thenceforward under the name of the "Independent Cotton-Seed Association." There was a provision in the contract by which other mills were to be admitted by consent, and a fifth corporation was in fact subsequently admitted. The Hanaur Oil-Works was one of these contracting corporations; the contract being authorized by both shareholders and directors. In July, 1886, the business of the second year having been about concluded, the board of directors of the Hanaur Oil-Works passed a resolution declaring this contract void, as being an agreement ultra vires, and their president was instructed to take possession of their mill. * * *

The argument here has largely turned upon the correctness of the charge of the circuit judge, who distinctly instructed the jury that the contract between the Hanaur Company and the other four corporations was a contract for a partnership between corporations, and that, under the charter of the Hanaur Oil-Works, it had no power to make such a contract, and that it was therefore void, and that it had a right to recover possession of its property, it being withheld solely under and by virtue of an agreement ultra vires. "A partnership," says Judge Story, "is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. Pothier says that a partnership is a contract whereby two or more persons put, or contract to put, something in common, to make a lawful profit in common, and reciprocally engage with each other to render an account thereof." Story, Partn. § 2.

A careful examination of this agreement discloses every essential element to a contract of partnership. The absolute ownership of the corporate property, the mills, machinery, etc., is not conveyed to the partnership, nor is this necessary. The beneficial use of all such property is surrendered to the common purpose. The provisions for the complete possession, control, and use of the properties of the several corporations by the partnership or syndicate is perfect. Nothing is left to the several copartners but the right to receive a share of the profits, and participate in the management and control of the consolidated interest as one of the new associations. The contract is both technically and in its essential character a partnership, in so far as it is possible for corporations to form such an association.

It is, however, argued by the learned counsel for appellants, that if it be a partnership, that it does not therefore follow that it is ultra

vires; that such a contract, not being prohibited by law, or the charter of the defendant in error, or against public policy, is not void even rf in excess of powers expressly conferred; that the business proposed by the contract being within the purposes of the charter, is therefore within the implied powers of the corporation, and not ultra vires. In other words, "that the question is not whether the corporation had, by virtue of the act of incorporation, authority to make the contract, but whether they are by those statutes forbidden to do it." In this doctrine we do not concur. There is, however, respectable authority for the position. A corporation, being an artificial creation, is the very thing it is made by the statute which brings it into being, and nothing more. The extent of its powers are those enumerated in its charter, or implied by fair and natural construction of powers expressly conferred.

The charter is the measure of its powers, and the enumeration thereof implies the exclusion of all others. We are not to look to the charter to see whether the thing done be prohibited, but whether there is authority to do it. These principles we understand to have the support of the great weight of authority in this country, and to have the sanction of the supreme court of the United States. Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950. This view of the law has been the one entertained by this court, and clearly and distinctly enforced, in an opinion by the present chief justice in the case of Elevator Co. v. Railroad Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798.

The power to enter into a partnership is not expressly or impliedly conferred by our act of 1875, under which the Hanaur Oil-Works is incorporated. Neither is such authority within the implied powers of corporations. A partnership and a corporation are incongruous. Such a contract is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties expressly enjoined upon a corporation, whether it be a strictly business and private corporation, or one owing duties to the public, such as a common carrier. In a partnership each member binds the firm when acting within the scope of the business. A corporation must act through its directors or authorized agents, and no individual member can, as such member, bind the corporation. Now, if a corporation be a member of a partnership, it may be bound by any other member of the association, and in so doing he would act, not as an officer or agent of the corporation, and by virtue of authority received from it, but as a principal in an association in which all are equal, and each capable of binding the society by his acts.

The whole policy of the law creating and regulating corporations looks to the exclusive management of the affairs of each corporation by the officers provided for or authorized by its charter. This management must be separate and exclusive, and any arrangement by which the control of the affairs of the corporation should be taken

from its stockholders and the authorized officers and agents of the corporation would be hostile to the policy of our general incorporation acts. The decided weight of authority is that a corporation has not the power to enter a partnership, either with other corporations, or with individuals. Says Mr. Morawitz: "It seems clear that corporations are not impliedly authorized to enter into partnership with other corporations or individuals. The existence of a partnership not only would interfere with the management of the corporation by its regularly appointed officers, but would impair the authority of the shareholders themselves, and involve the company in new responsibility, through agents over whom it had no control." 1 Mor. Priv. Corp. § 421; Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681; Ang. & A. Corp. § 272.

It is unnecessary to consider this contract as constituting a mere traffic arrangement, for the conclusion already announced, that it was an effort to form a partnership, determines that in its scope and effect it sought to accomplish much more than would be understood by the phrase "traffic arrangement." * * *

But the defense here made would result, if successful, in enforcing the performance of the unexecuted part of a void contract. It is not a case of contract fully executed. The part remaining to be executed is a material part, and is beyond the power of defendant in error to make or sanction. Having entered into it, it was its duty to rescind or abandon it. In a case where a lease had been made by a railway company for a term of twenty years of its road and franchises, and which, after a lapse of five years, it rescinded, and was thereupon sued for damages under a clause in the lease which authorized rescission, and provided for compensation for unexpired term, the supreme court of the United States said: "It is not a case of a contract fully executed. The very nature of the suit is to recover damages for non-performance. As to this it is not an executed contract. Not only so, but it is a contract forbidden by public policy, and beyond the power of defendant to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause which gave them the right to do it. Though they delayed its performance several years, it was nevertheless a rightful act when done. Can this performance of a legal duty—a duty both to stockholders and to the public—give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law the stronger is the claim to its enforcement by the courts." Thomas v. Railroad Co., 101 U. S. 86, 25 L. Ed. 950.

That the defendant in error has submitted to a void contract by which it has been deprived of the use of its property for two years, furnishes no sound reason why it shall submit for three years. To hold that it did would be to apply the doctrine of part performance in a way to perfect and legalize illegal contracts which were partly performed.

We have not deemed it necessary to consider the question of the legality of such a combination of corporations as one tending to create a monopoly, for the ground upon which we place the case needs no additional proof. The question of the validity of such an arrangement is a very grave one, but need not now be considered.

The suggestion that, if this contract was void, yet nevertheless it operated to convert the managers of the combination into tenants from year to year, and that such tenancy could only be terminated at the end of a year, and upon six months' notice, is not tenable. The relation of landlord and tenant never existed under the contract if it be considered as valid, and could not spring from its illegality. The Hanaur Mill Company had a right to repudiate the arrangement at any time, and it was the duty of plaintiffs in error to have at once surrendered possession.

The service of a writ in a suit of unlawful detainer was the only notice they could legally demand. When the action of unlawful detainer will lie under our statutes, no other notice than the suing out of a writ is necessary. Code Mill & V. § 4082. The result is that we hold that there was no error in the charge of the circuit judge, or his refusal to charge, and the judgment must be affirmed with costs.[28]

FOLKES, J., having been of counsel, did not sit in this case.

BOOTH et al. v. ROBINSON.

(Court of Appeals of Maryland, 1880. 55 Md. 419.)

Bill by certain stockholders in the Powhatan Steamship Company against the defendants, some of whom are directors in the company, to obtain redress for loss in value of their shares due to the alleged fraudulent and wilful mismanagement of the company. Among the questions raised was that of the power of the Baltimore Steam Packet Company to purchase and hold stock in the Powhatan Company.[29]

[28] Accord: Whittenton Mills v. Upton et al., 10 Gray (Mass.) 582, 71 Am. Dec. 681 (1858); Geurinck v. Alcott, 66 Ohio St. 94, 63 N. E. 714 (1902); Wilson v. Carter Oil Co., 46 W. Va. 469. 33 S. E. 249 (1899); People v. North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843 (1890).

Contra: Catskill Bank v. Gray et al., 14 Barb. (N. Y.) 471 (1851).

Compare: Bates v. Coronado Beach Co., 109 Cal. 160, 41 Pac. 855 (1895); Lehigh Valley Ry. Co. v. Dupont, 128 Fed. 840, 64 C. C. A. 478 (1904).

[29] Statement of facts substituted.

ALVEY, J.[80] * * * This, it is contended by the plaintiffs, could not be done without express authority by law. But, while some courts have so held, the great weight of authority is the other way. There is nothing in the charter of the Steam Packet Company, or in the nature of its business, that would, in the slightest manner, forbid the exercise of such power; and having money to loan or invest, there would appear to be no good reason why it might not invest in the stock of other corporations as well as in any other funds, provided it be done bona fide, and with no sinister or unlawful purpose. The courts of England, at one time, strongly opposed the right of one corporation to deal or invest in the stock of another corporation without express authority for so doing; but that opposition has been entirely overcome, and is now settled there, that one corporation may deal in the shares of another without express authority so to do, unless where expressly prohibited, or the nature of its business render it improper so to deal. In re Barned's Bank, L. R. 3 Ch. 105; In re Asiatic Banking Co., L. R. 4 Ch. 252. In the latter of the cases just cited, Lord Justice Selwin, in speaking of this power of corporations, said: "As to the capacity of a trading corporation to accept shares in another trading corporation, it is sufficient for me to say that I entirely agree with the judgment of Lord Cairns, in the case of Barned's Banking Company, viz., that there is not, either by the common or statute law, anything to prohibit one trading corporation from taking or accepting shares in another trading corporation. There may, of course, be circumstances which prohibit or render it improper for a company so to do, having regard to its own constitution, as defined by its memorandum and articles."

It is in accordance with this statement, that the law is laid down as settled, by Brice, in his work on Ultra Vires, pp. 91, 92. And in this state, the same principle has been fully sanctioned in the case of Elysville Mfg. Co. v. Okisko Co., 1 Md. Ch. 392, and same case affirmed on appeal in 5 Md. 152. Here, the stock that was purchased on account of the Steam Packet Company was transferred to the names of Robinson and Shoemaker, who held it as trustees for the benefit of the Steam Packet Company; and being thus qualified, they were legally eligible as directors in the Powhatan Company. The fact of their being directors of the Steam Packet Company in no way disqualified them from also being directors of the Powhatan Company. But if there have been as alleged, illegality or impropriety in their acts and proceedings in the management of the affairs of the latter named company, such acts and proceedings are subject to different considerations. * * *

Decree reversed and cause remanded.[81]

[80] A part of the opinion is omitted.

[81] Layng v. A. French Spring Co., 149 Pa. 308, 24 Atl. 215 (1892). Compare Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842 (1903); Clark et al. v. Memphis St. Ry. Co., 123 Tenn. 232, 130 S. W. 751 (1910).

FIRST NATIONAL BANK OF CHARLOTTE v. NATIONAL EXCHANGE BANK OF BALTIMORE.

(Supreme Court of the United States, 1875. 92 U. S. 122, 23 L. Ed. 679.)

Action by the First National Bank of Charlotte, N. C., against the National Exchange Bank of Baltimore to recover $40,000 paid to the latter under the following circumstances. The First National Bank desiring to increase its capital stock, and for that purpose to deposit $50,000 in bonds with the treasurer of the United States, employed Bayne & Company of Baltimore as its agent, to procure the bonds and deliver them at the treasury. Not having money to pay for them at the time, a certificate was issued, stating that the plaintiff held on deposit for Bayne & Co. fifty-five thousand United States 5/20 bonds.

This certificate was pledged by Bayne & Co. with other securities to the defendant bank as collateral to secure certain loans.

Shortly afterwards, the plaintiffs paid the amount due for the bonds, but the certificate was not surrendered. Bayne & Co. failed and the defendants refused to deliver the certificate, claiming to hold for value and demanding the delivery of the bonds. A settlement was finally made by which the plaintiff paid to the defendant $55,000 in return for the certificate, and 400 shares of railroad stock, one thousand shares of coal mining stock and one hundred and twenty-five shares of its own stock. Three years after this settlement the present action was brought to recover the amount paid by the plaintiff under the settlement less $15,000, the estimated value of its own stock purchased. Writ of error to the court of appeals from a judgment affirming the decision of the trial court in favor of the defendant.[82]

WAITE, C. J. The question presented for our consideration in this case is, whether a national bank, organized under the National Banking Act, may, in a fair and bona fide compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time, that, by turning the stocks into money under more favorable circumstances than then existed, a loss, which would otherwise accrue from the transaction, might be averted or diminished. Such, according to the finding below, was the state of facts out of which this suit has arisen. That finding is conclusive upon us.

A national bank can "exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of ex-

[82] Statement of facts substituted.

change, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes." Rev. St. § 5136, par. 7, 13 Stat. 101, § 8 (U. S. Comp. St. 1901, p. 3456).

Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do, in this behalf, whatever natural persons could do under like circumstances.

To some extent, it has been thought expedient in the National Banking Act to limit this power. Thus, as to real estate, it is provided (Rev. St. § 5137, 13 Stat. 107, § 28 [U. S. Comp. St. 1901, p. 3460]) that it may be accepted in good faith as security for, or in payment of, debts previously contracted; but, if accepted in payment, it must not be retained more than five years. So, while a bank is expressly prohibited (Rev. St. § 5201, 13 Stat. 110, § 35 [U. S. Comp. St. 1901, p. 3494]) from loaning money upon or purchasing its own stock, special authority is given for the acceptance of its shares as security for, and in payment of, debts previously contracted in good faith; but all shares purchased under this power must be again sold or disposed of at private or public sale within six months from the time they are acquired.

Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in Fleckner v. Bank of United States, 8 Wheat. 351, 5 L. Ed. 631, where it was held that a prohibition against

trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an indorsed note in payment of a debt due was decided not to be a "dealing" in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices.

It is difficult to see how a debt due from, or a contested obligation resting upon, a bank, occupies any different position in respect to this power of adjustment and compromise from that of a debt owing to it. The object in both cases is to get rid of or reduce an apprehended loss growing out of legitimate business; and it would seem that whatever might be done in the one case ought not to be excluded from the other under the same circumstances. Often a discharge by a bank of its own obligation creates a debt due to it from another. Such was the case here. Bayne, without authority, transferred to the defendant, as collateral security for his indebtedness, a certificate of deposit issued to him by the plaintiff, and afterwards collected the money due upon the certificate from the plaintiff without disclosing the transfer. Any payment by the plaintiff to the defendant, therefore, in discharge of its liability upon the certificate, became a lawful charge against Bayne. He was insolvent. It was, on this account, not only the right, but the duty, of the officers and agents of the plaintiff to protect by their arrangements, as far as possible, the stockholders whose interests they represented. This was necessarily left to their judgment and discretion. No question of good faith is involved. The transaction for all the purposes of this suit must be taken to have been, in fact, what it purports to be,—a fair and honest compromise of an outstanding claim, with a view to ultimate protection against an impending loss. As such, we think it was within the corporate powers of the bank, and that the Court of Appeals did not err in so holding.

Judgment affirmed.[88]

ROBINSON v. HOLBROOK et al.

(Circuit Court, D. Rhode Island, 1906. 148 Fed. 107.)

BROWN, District Judge. In disposing of this petition for a preliminary injunction, we may pass all questions as to the regularity of the call for the special meeting of the shareholders of the Gorham Manufacturing Company, and as to the breadth of the powers conferred upon the directors, and proceed at once to the substantial questions presented by the resolution of the board of directors of the

[88] Accord: Howe v. Boston Carpet Co., 16 Gray (Mass.) 493 (1860).

Gorham Manufacturing Company, passed May 1, 1906. This resolution instructed Mr. Holbrook, the treasurer of the Gorham Company, to vote upon the shares of stock of the Silversmiths' Company held by the Gorham Company, in favor of an increase of the capital stock of the Silversmiths' Company from $100,000 to $10,000,000, divided into 100,000 shares at $100 each; for an issue of 70,000 shares at par, as follows: $1,750,000, or 17,500 shares, at par for cash to holders of preferred and common stock of the Gorham Company in proportion to their holdings, any portion of said 17,500 shares not taken by the Gorham Company shareholders to be sold to the public; $5,250,000, or 52,500 shares, or so much thereof as may be taken in exchange at par, to holders of the common stock of the Gorham Company, in exchange for their holdings in the Gorham Company at a valuation of $210 per share for the common stock of the Gorham Company. The treasurer was further instructed to sell to the Silversmiths' Company, the Gorham Company's holdings of shares of stock of the Whiting Manufacturing Company, of the William B. Durgin Company, of the Silversmiths' Company of New Jersey, of the Silversmiths' Company of New York, and all the assets late of W. B. Kerr & Company, Inc., at a price not less than the cost thereof to the Gorham Company to the date of sale.

The complainant, a nonassenting shareholder of the Gorham Company, seeks to enjoin the carrying out of this plan, contending that it is beyond the corporate powers of the Gorham Company, is offensive to the principle that a person occupying a fiduciary relation, who is authorized to sell property for another, cannot himself become the purchaser, directly or indirectly, and is against the rights and financial interest of the complainant. It is also alleged that this plan is not in pursuance of any need or purpose of the Gorham Company, but is solely for the purposes of the majority of shareholders, and especially of Mr. Holbrook; and contemplates and will result in a control of the Gorham Company's affairs by the Silversmiths' Company, as a holding company.

After a careful consideration of the complainant's bill, of the affidavits, and of the authorities cited, I am of the opinion that the controversy is of a substantial character, involving important questions of law as to the corporate powers of the Gorham Manufacturing Company, and as to the legal right of a majority of the shareholders of the Gorham Company to effect or to aid in this manner the transfer of important assets of the Gorham Company to the Silversmiths' Company, or to provide for the ownership by the Silversmiths' Company of shares of Gorham Company stock. There is reason for thinking that the plan disclosed by the resolutions of the directors may comprehend purposes which hardly can be regarded as corporate purposes of the Gorham Company, or as properly incident thereto.

Assuming that it may be for the interest of the Gorham Company to dispose of its shareholdings in other corporations, though this is

disputed by the complainant, there are serious doubts of the right to do this at a price fixed arbitrarily by persons who are to become shareholders in the Silversmiths' Company, which is to acquire these shares of stock; and it is questionable, at least, whether it is a corporate purpose of the Gorham Company to promote, to provide for, or to lend the sanction of its corporate vote to the acquisition by the Silversmiths' Company of a considerable proportion of the shares of stock in the Gorham Company, so that the Silversmiths' Company is to have a considerable voice in, if not control of, the management of the Gorham Company.

It is apparently the purpose of the majority of shareholders of the Gorham Company that the Silversmiths' Company shall be a holding company which shall hold not only the shares of stock in other companies now owned by the Gorham Company, but also shares of stock to the amount of 25,000 shares in the Gorham Company itself. A holding of this amount of shares by the Silversmiths' Company would give it an equal voice with all other shareholders of the Gorham Company in the management of the affairs of the Gorham Company; and but a single additional share, acquired either by the Silversmiths' Company or by a person interested in the Silversmiths' Company, would be sufficient to constitute a complete control of the Gorham Company.

Ordinarily, corporate combinations effected through a holding corporation are organized by dealings which are entirely between the holding corporation and the shareholders of the several companies whose shares are to be held. Noyes on Intercorporate Relations, § 310, par. 1.

In the present case, substantially all the shares of stock of the Silversmiths' Company, whose present capital is $100,000, are owned by the Gorham Company, which is to be the author of a conversion of the $100,000 corporation into a $10,000,000 corporation which is to acquire stocks in other companies to the extent of nearly $7,000,000. The Gorham Company's authorized capital stock is $5,000,000. It is permitted to purchase, own, hold, and dispose of shares of the capital stock of other corporations to the extent of 35 per cent. of its capital stock. It is intended to base upon corporate action of the Gorham Company, the practical creation of a distinct corporation holding nearly $7,000,000 of said stock, or about $5,000,000 in excess of what the Gorham Company is authorized by its own charter to hold. The fact that the Silversmiths' Company is already incorporated does not alter the fact that it is intended that the Gorham Company is to institute a substantially new corporation.

Assuming that the amendment to the charter of the Gorham Company, which authorizes it to hold stock in other corporations, gives to the Gorham Company the ordinary rights of a shareholder to vote upon the shares of stock which it holds, can it be said that the voting power which is incident to its right to hold shares of stock in

other corporations enables it to take such corporate action as will convert a subsidiary company into a corporation of larger capital stock than itself? Was it the intention of the Rhode Island Legislature, in granting to the Gorham Company the right to be a stockholder, to confer upon it, as an incident to that right, the unlimited right to create, by increase of capital stock of its subordinate companies, an indefinite and unlimited amount of shares? If the right exists to enlarge the Silversmiths' Company from a $100,000 to a $10,000,000 corporation, it equally exists as to every other company whose shares of stock are now owned by the Gorham Company.

Looking to the substance of the complainant's rights as a large shareholder in the Gorham Company, there certainly is force in the complainant's objection that the Gorham Company, by its stockholders' vote and by the action of its board of directors in pursuance thereof, has embarked in the promotion of an enterprise foreign to that for which it was created, and which, if effected, will leave the complainant the choice of investing a considerable amount of additional capital in the Silversmiths' Company and of parting with his shares in the Gorham Company in exchange for shares in the Silversmiths' Company, a holding corporation, or, on the other hand, of remaining a shareholder in the Gorham Company with the risk that it shall be managed not solely for its own interests, but with regard to the interests of other corporations controlled by the Silversmiths' Company.

One of the advantages of the plan which was specifically urged at the stockholders' meeting was, "providing a central control which shall be exercised over the different properties." It will be for the interest of the shareholders of the Silversmiths' Company to so operate the various corporations as to yield the largest result from their aggregate operations. There is a substantial difference between the present status of the Gorham Company, as a prosperous and independent corporation, and its proposed status as a corporation controlled by a holding company, and managed with regard to the interests of other distinct corporations under the control of the same holding company.

The defendants' contention is that the right to purchase, own, hold, and dispose of shares in other corporations gives the Gorham Company the ordinary right of a shareholder to vote upon these shares, and also an unlimited right as a shareholder to initiate whatever corporate action of the Silversmiths' Company the Gorham Company as a shareholder may see fit. The conclusion to which this argument logically leads arouses a suspicion of its soundness. No limitation is placed upon the kinds of shares which the Gorham Company may hold. It may own shares in railroads and manufacturing companies, and corporate shares of every kind. If, by virtue of its shareholdings, it may create holding companies for the silversmith business,

the same argument would authorize it to create holding companies for other branches of industry.

The power to invest in shares of other corporations must, however, be regarded as incidental to the charter purposes of the Gorham Company; i. e., "manufacturing goods made of gold, silver, or other metallic substance, and for the transaction of other business connected therewith." The incidental power to invest granted by amendments to the charter is to be narrowly construed, being in derogation of the ordinary rule that one corporation cannot invest in shares of stock of another. It would involve great practical difficulties were we to hold that the power to invest in shares of other corporations can be construed as an unlimited power to initiate or to promote new enterprises different in character and scope, perhaps exceeding in magnitude, that for which original charter powers were granted. It seems probable that the power of holding shares is a subordinate power, not to be so exercised as to enlarge the general scope of the business of the corporation by promoting other distinct corporate enterprises, whether in a different field or in the same field. It is very doubtful whether, by giving the Gorham Company power to invest in the shares of other corporations, the Legislature intended to confer the power to set up and practically create a new corporation in the same line of business which should control its creator.

In deciding upon this petition, I do not proceed upon the ground that a fraudulent intention is exhibited in any of the acts of the defendants. Apparently it was not regarded by a majority of the shareholders of the Gorham Company as undesirable that Mr. Holbrook should have a large or controlling voice in the Silversmiths' Company. But whether or not this plan is preferred by a majority of the shareholders is not the question. Giving due consideration to the fact that a majority of shareholders may regard this action as for their pecuniary advantage, and to the rule that all problems of business judgment are to be determined by a majority vote, yet it must be remembered that the majority are limited in their powers by the charter, and that this cannot be overridden however profitable it might be for the majority to carry out what they apparently, in good faith, regard as a sound business proposition.

In view of the importance of the questions which have been presented, I am of the opinion that the complainant presents a proper case for a preliminary injunction. Having regard to the interests of a majority of the shareholders, it seems to me highly undesirable that this plan should proceed; that the Silversmiths' Company should put forth the new issue of shares, and the exchange of Gorham Company shares be made and the assets of the Gorham Company transferred to the Silversmiths' Company, while this bill is pending. Should an injunction be refused at this time, and the complainant's bill subsequently be sustained, the injury to the complainant from a failure to grant temporary relief would be great, and perhaps irrepar-

able; and the injury to the defendants which would result from undoing what had been done would doubtless be great. The best interests of all parties will be subserved by granting this preliminary injunction. Having in mind the statements of complainant's counsel as to his willingness to proceed speedily to a hearing on the merits, I think that if the defendants desire a shorter time than that allowed by the rules should be fixed for the taking of testimony, in order that the case may be finally determined on full hearing as speedily as possible.

The petition for a preliminary injunction is granted.

NASSAU BANK v. JONES et al.

(Court of Appeals of New York, 1884. 95 N. Y. 115, 47 Am. Rep. 14.)

Appeal from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 9, 1883, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 49 N. Y. Super. Ct. 498.)

Action against the defendants, executors of the will of Daniel Jones to compel them to transfer and deliver to plaintiff $50,000 of bonds and twenty-five shares of stock in the Denver & Rio Grande Railway Company or to pay over the value thereof and all interest and dividends received by their testator therein. It is claimed by the plaintiffs that the stocks and bonds in question were acquired by defendants' testator as agent for the plaintiffs.[34]

RUGER, C. J.[35] The question involved in this case, as we regard it, is the right of a banking corporation chartered under the laws of this state to subscribe for the stock of a railroad. * * *

It becomes necessary, therefore, to inquire into the nature of the proposed contract, and the legal capacity of the plaintiff to transact business.

The proposition of the railroad company contemplated either a loan of money, or a sale of its stock and bonds; and the view we take of the case does not render it material to determine which construction should be given. By whatever name it be called, the transaction contemplated that its subscribers should become the legal owners of the certain stock and bonds thereby offered to be disposed of.

If it be regarded as a loan, the subscriber would receive the bonds with their mortgage security, as an evidence of the company's indebtedness to him; and the stock as a bonus to induce the making of the loan. On the other hand, if it be considered as a purchase of

[34] Statement of facts abridged.

[35] A part of the opinion dealing with ultra vires is omitted.

the stock and securities of the railroad corporation, the subscriber becomes the owner of such stock and bonds upon complying with the conditions of the proposition.

In either event he becomes the absolute owner of the property proposed to be delivered in exchange for the money advanced, and acquires all the rights and privileges, and subjects himself to all the liabilities of such proprietorship.

The acquisition by the railroad of a new class of stockholders, was as much a part of the scheme as the creation of a debt; and its proposition to loan money could not be availed of, under the terms of the offer without necessarily involving an acceptance of the privileges, and incurring the liabilities of a stockholder. The offer of this stock was a material part of the proposition, and was undoubtedly largely relied upon as an inducement to investors. The increase of creditors and stockholders would proceed pari passu, under this scheme; and the subscribers to the loan might, in case of the company's insolvency, eventually, as the owners of its stock, be compelled to contribute to the payment of its debts.

It is clear that a banking corporation cannot enter into a contract of this character, unless it has authority under its charter to become a subscriber for the stock of railroad corporations, and thereby assume the obligations to which stockholders are subject by statute. Adderly v. Storm, 6 Hill, 624.

It is scarcely conceivable that it can be seriously urged, that a moneyed corporation, having under its charter the right to transact a banking business only, may legally engage, as a corporation, in the construction of railroads, or in furnishing money for such an object, in exchange for the stock of a railroad corporation, and yet when this case is analyzed and stripped of its irrelevant details and circumstances, we cannot see why this is not precisely what was attempted by the plaintiff. * * *

Judgment affirmed.[86]

FRASER v. RITCHIE.

(Appellate Court of Illinois, 1881. 8 Ill. App. 554.)

The appellees are judgment creditors of the Eagle Works Manufacturing Company, a corporation. After a nulla bona return on an execution against the corporation, the present bill was filed against appellants, seeking to subject to this judgment certain personal property, formerly owned by the corporation but sold to the appellants in consideration of the sale and surrender to the corporation of $30,000 worth of its own stock. The bill charges that the sale is fraud-

[86] Accord: Franklin Company v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9 (1877).

ulent and void as against appellees. From a decree in favor of the appellees an appeal is taken.[87]

WILSON, J.[88] The principal question arising in this case relates to the power of a corporation to purchase its own capital stock.

It must be admitted that no fixed nor very well-defined rule is deducible from the authorities as to the right of an incorporated company to use its corporate funds or property in the purchase of its stock. The doctrine, as commonly stated in general terms is, that the capital stock of a corporation constitutes a trust fund for the payment of its debts, such stock being regarded as a substitute for the personal liability which subsists in private partnerships. It is said that when debts are incurred, a contract arises with the creditors, that the capital stock, or property of the company shall not be withdrawn or applied otherwise than to the satisfaction of their demands; that the creditors have a lien upon it in equity, and that if diverted they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration without notice. 2 Story, Eq. § 1252; Perry on Trusts, § 217; Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944.

This principle, as a general proposition, would seem to be founded in reason and justice, and may be regarded as settled law. But it remains to be considered whether the principle, as stated, is one of universal application, admitting of no exceptions, or whether it is limited in its application, depending upon the circumstances of each particular case, the time and manner of its application, the provisions of the charter of the corporation, the nature of its business, etc.

In England the doctrine seems to be settled that corporations, whatever may be the nature of their business, cannot, without an express authority in their charters, deal in their own stock.

In Brice on Ultra Vires (2d Am. Ed.) 94, it is said: "There is a great difference between dealing in the shares of other companies and its own. The former is ordinary business, attended with the usual risks of ordinary transactions, but the latter tends inevitably to breaches of their duty on the part of the directors, and to fraud and rigging of the market on the part of the corporation; consequently a corporation to possess such power, must have it conferred by the plainest, and most explicit language in the constating instruments."

The current of American authorities, on the other hand, seems to be to the effect that under certain circumstances and for certain purposes, moneyed corporations and corporations possessing banking powers, and in some instances other corporations, may invest their funds in the purchase of their own stock, subject to certain restrictions and limitations, one of which is that it shall not be done at

[87] Statement of facts substituted. [88] A part of the opinion is omitted.

such time and in such manner as to take away the security upon which the creditors of the corporation have the right to rely for the payment of their claims, or in other words, so as not to diminish the fund created for their benefit. Each case must therefore depend upon and be determined by its own facts and circumstances, and the difficulty sometimes met with grows out of the proper application of the rule of law to the facts of the particular case. Bartlett v. Drew, 57 N. Y. 587; Curran v. Arkansas, 15 How. 304, 14 L. Ed. 705; Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; Spear v. Grant, 16 Mass. 9; Taylor v. Miami Exporting Co., 6 Ohio, 177; Dudley v. Price, 10 B. Mon. (Ky.) 84; Bank v. St. John, 25 Ala. 568; Scott v. Eagle Fire Ins. Co., 7 Paige (N. Y.) 198; Bigelow v. Society, etc., 11 Vt. 283; Perry on Trusts, supra.

In many of the cases just cited, and in others which we have examined, the refusal of the courts to uphold the purchase by the corporation of its stock, was placed upon the ground that the corporation was at the time insolvent, or that the stock was surrendered for the purpose of winding up the company. In other cases the stock was not purchased and held by the corporation as an investment of its funds, but was immediately canceled and never re-issued, thereby diminishing by so much the capital stock. Under such circumstances the purchase and cancellation of the stock was held to be in fraud of the rights of creditors in lessening the fund upon which they had the right to rely for their protection. We shall not stop to quote from the cases cited nor review them in detail, it being sufficient to say that in none of them is the power of a corporation to purchase its stock denied, except where the circumstances were such as to render the transaction either actually or constructively fraudulent, either as to creditors or to other stockholders of the corporation.

In Peterson v. Ill. Land & Loan Co., decided by this court and reported in 6 Ill. App. 257, it was not intended to assert the doctrine that a corporation had no power under any circumstances to purchase shares of its own stock. In that case, Clapp, a stockholder, surrendered to the company 555 shares, or more than one-half of its entire capital stock, in exchange for real estate owned by the company. The shares were not purchased by the company, and held by it as an investment, but were immediately canceled and never re-issued. The cancellation of the stock and the alienation of the real estate was simply an extinguishment of more than half the assets of the corporation, leaving it without the means to pay its creditors in full. It was thus practically the first step in the winding up of the company. We then said: "It was not the taking of stock pledged for the payment of a debt due to the company, nor yet a purchase of the stock to be held as an investment for the benefit of the company and the stockholders generally. The stock was never re-issued, but was canceled and extinguished, thus diminishing by more than one-half the entire capital of the company. The company conveyed to

Clapp valuable real estate in exchange for his stock, and thereby reduced its available assets to the extent of the value of the property conveyed. If it could do this with one shareholder, it could do it with another, until there should be neither capital stock nor corporate property remaining out of which to satisfy creditors."

As will be perceived, our decision was based, not upon the ground of an entire want of power of a corporation to purchase its stock, but that under the circumstances of the case for it to do so was in fraud of the rights of the creditor. And upon principle, we think it would be pushing the doctrine of trusts as applied to the capital stock of an incorporated company too far to hold that it takes away the power of the corporation to purchase its stock under any and all circumstances, for this would be to deprive it of the right to make an investment which, in a given case, might be highly advantageous both to the creditor and the corporation, and would moreover ignore all distinctions between a corporation which is insolvent or in process of dissolution, and one which is engaged in a prosperous and active business, with abundant means to meet all its obligations. If, in contemplation of winding up, or when insolvent, a corporation should attempt to divide its effects among its stockholders, either directly or indirectly, by accepting a surrender of their stock in exchange for the corporate property, the transaction would not be upheld as against the equitable rights of creditors; and this, it is apprehended, is the limited application of the doctrine which the American courts and text-writers have intended when speaking of the trust character of capital stock, rather than that general and universal application which would deprive a corporation of all power and discretion in respect to the disposition of its capital stock.

Without going more at large into this branch of the case, our conclusion is that the weight of authority in this country is in favor of the power of a corporation to purchase its own capital stock, except where the circumstances are such as to show that the purchase was fraudulent in fact, or that the corporation was insolvent or in process or contemplation of dissolution at the time of the purchase.

Most of the cases which we have examined were, it is true, cases relating to financial or commercial corporations, but we are unable to see any valid grounds for holding that a corporation for manufacturing purposes may not, as between itself and its creditors, invest its surplus earnings in the purchase of shares of its stock, which would not apply with equal force to the former class.

By the stipulation of the parties, it is admitted that the purchase of the stock by the company from Fraser and Chalmers was entirely fair, and made by both parties in good faith. It is admitted that at the time of the purchase the company was solvent, and had assets sufficient to pay all its liabilities, including the capital stock, leaving a large surplus; that the stock was worth more than par, and known to be so by all the parties; and that the property received by Fraser

and Chalmers in exchange for the stock was fairly valued. It is admitted that the stock bought of Fraser and Chalmers was not surrendered by them for cancellation, and if canceled, was not canceled until after they had ceased to be members of the company, except as to $600 surrendered by Fraser, and $1,520 by Chalmers, December 30, 1871. It is also admitted that the stock was not surrendered for the purpose of winding up the company, and that no winding up was contemplated for at least a year after Fraser and Chalmers sold their stock and retired from the company, and that meantime the company continued doing a prosperous business.

These admitted facts exclude all actual fraud, and if the view which we have adopted as to the law be correct, they also exclude all constructive fraud, and place the transaction beyond the attack of creditors. * * *[ss]

TREVOR et al. v. WHITWORTH et al.

(House of Lords, 1887. L. R. 12 App. Cas. 409.)

Appeal from a decision of the Court of Appeal.

James Schofield & Sons, Limited, were incorporated in 1865 under the Companies Act 1862 with a capital of £150,000. in 15,000 shares of £10. each. The objects, as stated in the memorandum of association, were to acquire and carry on the business of certain flannel manufacturers, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto, or proper to be carried on in connection therewith.

The memorandum did not authorize the company to purchase its own shares.

The company having in 1884 gone into liquidation in the Court of Chancery of the County Palatine of Lancaster, a claim was made against the company by the respondents, as executors of Whitworth a deceased shareholder, for the balance of the price of Whitworth's shares sold by the executors to the company in 1880, and not wholly paid for. The circumstances under which the purchase in question and other purchases by the company of its own shares were effected are stated in the judgments.

A summons having been taken out by the appellants, the official liquidators, to determine whether the claim ought to be allowed, the Vice-Chancellor of the county Palatine made an order declaring that, without prejudice to any claim by the claimants against any per-

[ss] Accord: Gilchrist v. Highfield, 140 Wis. 476, 123 N. W. 102, 17 Ann. Cas. 1257 (1909); Dupee v. Boston Water Power Co., 114 Mass. 37 (1873); Clapp v. Peterson, 104 Ill. 26 (1882).

Compare: Adams & Westlake Co. v. Deyette, 8 S. D. 119, 65 N. W. 471, 31 L. R. A. 497, 59 Am. St. Rep. 751 (1895); Lowe v. Pioneer Threshing Co. et al. (C. C.) 70 Fed. 646 (1895).

sons other than the liquidators and the company, the claim against the company ought not to be allowed.

The Court of Appeal (Cotton, Bowen, and Fry, L. JJ.) reversed this decision and allowed the claim. Against this decision the liquidators now appeal. The only question presented is whether such a company can purchase its own shares. The judgment on the other points is omitted.[40]

LORD HERSCHELL, Lord Chancellor.[41] [After stating the facts and considering the question of whether or not the shares were purchased on behalf of the company:] * * * I pass now to the main question in this case, which is one of great and general importance, whether the company had power to purchase the shares. The result of the judgment in the Court below is certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states, as the objects for which the company is established, the acquiring certain manufacturing businesses and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be in any way auxiliary thereto, or proper to be carried on in connection therewith.

It cannot be questioned, since the case of Ashbury Railway Carriage & Iron Company v. Riche, Law Rep. 7 H. L. 653, that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect. These propositions are not and could not be impeached in the judgments of the Court of Appeal, but it is said to be settled by authority, that although a company could not under such a memorandum as the present, by articles authorize a trafficking in its own shares, it might authorize the board to buy its shares "whenever they thought it desirable for the purposes of the company," or "in cases where it was incidental to the legitimate objects of the company that it should do so." The former is Lord Justice Cotton's expression; the latter that of Lord Justice Bowen.

I will first consider the question apart from authority, and then examine the decisions relied on.

The Companies Act 1862 requires (section 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the com-

[40] Statement of facts abridged. [41] A part of the opinion is omitted.

pany proposes to be registered, divided into shares of a certain fixed amount; and provides (section 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association."

What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.

Experience appears to have shown that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Act of 1867 provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to show how inconsistent with the very constitution of a joint stock company, with limited liability, the right to reduce its capital was considered to be.

Let me now invite your Lordships' attention to the facts of the present case. The company had purchased, prior to the date of the liquidation, no less than 4142 of its own shares; that is to say, considerably more than a fourth of the paid-up capital of the company had been either paid, or contracted to be paid, to shareholders, in consideration only of their ceasing to be so. I am quite unable to see how this expenditure was incurred in respect of or as incidental to any of the objects specified in the memorandum. And, if not, I have a difficulty in seeing how it can be justified. If the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its

capital, but it was suggested that it might do so if that were not the object, but it was considered for some other reason desirable in the interest of the company to do so. To the creditor, whose interests, I think, sections 8 and 12 of the Companies Act were intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock available to meet the demands of the creditors.

What was the reason which induced the company in the present case to purchase its shares? If it was that they might sell them again, this would be a trafficking in the shares, and clearly unauthorized. If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof) is that this was intended to be a family company,' and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested in the old firm, or of those persons whom the directors thought they would like to be amongst this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the company's money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the business to be more profitably or satisfactorily carried on? I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these they could legitimately expend the moneys of the company to any extent they please in the purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase the shares, and not out of the funds of the company.

It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company.' I do not think so. The forfeiture of shares is distinctly recognized by the Companies Act, and by the articles contained in the schedule, which in the absence of other provisions regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shown themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different

footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in In re Dronfield, etc., Co., 17 Ch. D. 76: "It is not for me to say what the limits of surrender are which are allowable under the Act, because each case as it arises must be decided upon its own merits."

I turn now to the authorities. In Teasdale's Case, Law Rep. 9 Ch. 54, Lord Justice James said: "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." But in the subsequent case of Hope v. International Financial Society, 4 Ch. D. 327, 336, that learned judge said: "I am reported to have said in Teasdale's Case, Law Rep. 9 Ch. 54, that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, viz. to accept the surrender from the shareholder who cannot pay, and to release him from further liability, that might be good, although incidentally and to a small extent it may be said to diminish the capital." In the case which gave rise to these observations, a company having 150,000 shares issued, passed a special resolution that the directors should have power to apply the company's assets to purchase from shareholders willing to sell any number of shares not exceeding 100,000, and that such shares should not be re-issued by the directors without the authority of a general meeting. The Court of Appeal, affirming Vice-Chancellor Bacon, held that this scheme was invalid. Lord Justice James said: "Either this is a purchase of shares in the sense of trafficking in shares, which is a purchase not authorized by the memorandum of association, or it is an extinguishment of the shares, and therefore a reduction of the capital of the company." And the present Master of the Rolls made the following observations: "I agree with the Lord Justice that the dilemma is made perfect; for if you assume that there was to be a reissue of these shares, the shares are not canceled, they are existing shares, and the only way of geting rid of them again is to sell them. It is said that a selling of shares is not of itself a trafficking in shares. Well, that may be quite true. If I make a present of a horse I cannot be said to be dealing in horses, but I apprehend if I buy a horse for the purpose of selling it again, I do deal in a horse. So here, if you take that to be the reasonable meaning of the resolution, then the reso-

lution is this, that the company are to buy the shares for the purpose of re-issuing them, that is, for the purpose of selling them again. They do not say so in terms, but that is the necessary effect of what they intend to do by the resolution. That seems to be a trafficking in shares and a carrying on of the business which is not within the terms of the memorandum of association. It is true that that may not be a continuing business, but no more was that which was done in the case of the Ashbury Railway Carriage & Iron Company v. Riche, Law Rep. 7 H. L. 653. That was only to be one transaction but because the transaction was a business transaction not contemplated or mentioned in the memorandum of association, it was not allowed. If that therefore was the intention of this resolution, then it broke the rules, by enabling or forcing the company to enter upon a business which is not mentioned in the memorandum of association. But if it was not intended to re-issue these shares, then it seems to me to follow that the amount of capital represented by them was necessarily extinquished."

It appears to me that every word which I have just quoted from the judgment of the Master of the Rolls is strictly applicable to the circumstances of the present case. Again, in the case of Guinness v. Land Corporation of Ireland, 22 Ch. D. 349, 375, Lord Justice Cotton, after referring to sect. 38 of the Companies Act, said: "From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion, it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

The learned judges of the Court of Appeal in the present case did not purport to depart from the views thus expressed, but their judgments were based upon the decision of that Court in the case of In re Dronfield Silkstone Coal Company, 17 Ch. D. 76. In that case disputes having arisen as to the conduct of the business, the directors agreed with Ward, one of the largest shareholders, to purchase his shares and also his interest as landlord in the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect in March 1872. The business of the company was very prosperous for several years, but in 1879 it was ordered to be wound up, and the question then arose whether Ward was liable to be placed on the list of contributories. The late Master of the Rolls held that he was, on the ground that the company had no power to purchase the shares, but this decision was reversed by the Court of Appeal. Upon the question whether the company had the power contended for, I agree with the reasoning of the Master of the Rolls rather than with that of the

Court of Appeal. But I am not prepared to say that the judgment of the Court of Appeal refusing to make Ward a contributory was erroneous, looking at the circumstances which intervened subsequent to the purchase, and prior to the winding-up. It is not necessary, however, to detain your Lordships by a consideration of this question, as it can have no application to the present case. The transaction here is inchoate, and the Court is asked to compel its completion. This, I think, for the reasons I have given, they would not be justified in doing.

I ought to notice one other case, as it was much relied on by the learned counsel for the respondents. I refer to Phosphate of Lime Company v. Green, Law Rep. 7 C. P. 43. In that case the learned judges appear to have considered that the transaction amounted to a purchase of shares in the company, which was prohibited by its articles of association, but they held that it had been ratified by the shareholders. No question was raised in argument or determined as to the powers conferred by the memorandum of association, and it is to be observed that at that time it was not so clearly settled as it has been since the judgment in Ashbury Railway Carriage and Iron Company v. Riche, Law Rep. 7 H. L. 653, that a transaction not within the scope of the memorandum is incapable of ratification.

I move your Lordships that the judgment appealed from be reversed, and the judgment of the Vice-Chancellor restored, and that the respondents do pay to the appellants the costs in the Court of Appeal and in this House, and do repay to the appellants any moneys and costs received from them.[42]

LORD MACNAGHTEN. * * * There remains, however, a more serious objection still. It seems to me that if a power to purchase its own shares were found in the memorandum of association of a limited company, it would necessarily be void. There are two conditions of the memorandum—the condition defining the objects of the company, and the condition defining its capital—one or both of which would be affected by such a power. It must, therefore, be considered in connection with each. Suppose the dealing in its own shares were stated as an object for which a company was proposed to be established, could it be said that the subscribers were associated for a "lawful purpose" within the meaning of section 6 of the Act of 1862? If it were the only object of the company, no one would say so. Does the purpose of the association become lawful if legitimate objects are combined with an object which is not legitimate? It is significant that the Stock Exchange will not grant a settling day, or allow a quotation to any company which purports to have the

[42] Concurring opinions of Lord Watson and Lord FitzGerald and part of opinion of Lord Macnaghten omitted.

Accord: Bellerly v. Rowland & Marwood's Steamship Co., Ltd., L. R. 2 Ch. Div. 14 (1902); Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425 (1882). But see Morgan v. Lewis, 46 Ohio St. 1, 17 N. E. 558 (1888).

power of buying its own shares. But let me suppose a case where the purchase of its own shares is not one of the objects of the company, properly so-called, but a case where the subscribers to the memorandum think that the power of purchasing its own shares might be useful in the management of the company if it were permissible by law. Then it seems to me that one way of trying whether it is permissible or not would be to read it into the memorandum in connection with the condition which states what the capital is to be. Let me try it here in that way, using the very language of Cotton, L. J., who thought the power in the present case valid, because it was only "a power to authorize the board, whenever they thought it desirable for the purposes of the company, to buy the shares." The condition would then run thus: "The capital of the company is £150,000. in 15,000 shares of £10. each; but the board may buy back shares whenever they think it desirable for the purposes of the company to do so." It seems to me that a condition so qualified would be repugnant and contradictory to itself. At any rate, the qualification would have the effect of reducing one of the statutory conditions of the memorandum to an empty form. * * *

SECTION 3.—ULTRA VIRES ACTS

I. In General

BISSELL v. MICHIGAN SOUTHERN & N. I. R. COS.

(Court of Appeals of New York, 1860. 22 N. Y. 258.)

Comstock, Ch. J.[48] A general statement of the plaintiff's case is, that the two corporations defendant were jointly engaged in the business of carrying passengers and freight between Chicago and Lake Erie, through a part of the state of Illinois, and through the states of Indiana and Michigan, by three connected railroads which they owned or controlled, and the business of which was managed under a consolidated arrangement which had been in force between the defendants for some time previous to the injury complained of; that, being so engaged, they undertook and assumed to carry him, the plaintiff, as a passenger from Chicago, or a point near that place, eastward over the consolidated line of road; that he took his seat in their cars accordingly, and that during the transit he was injured by an accident which happened through their carelessness and neglect.

[48] Facts sufficiently stated in the opinion, and part of the opinion is omitted.

Assuming the truth of this statement, there is no doubt of the plaintiff's right to recover. But the defendants deny the legal truth of these facts, because one of the companies was chartered by the Legislature of Michigan, with power to build a road in that State, and the other by the Legislature of Indiana, with power to build one in that State. They both insist that they had no right or power under their respective charters to consolidate their business in the manner stated, and especially that they could not legally, either separately or jointly, acquire the possession and use of a connecting road in the State of Illinois and undertake to carry passengers or freight over the same. They do not deny that their boards of directors and agents, duly authorized to wield all the powers which the corporations themselves possessed, entered into the arrangements which have been mentioned, nor that, in the execution of those arrangements, they made the contract with the plaintiff to carry him as a passenger; nor do they deny that they received the benefit of that contract in the customary fare which he paid.

Their defense is, simply and purely, that they transcended their own powers and violated their own organic laws. On this ground they insist that their business was not, in judgment of law, consolidated; that they did not use and operate a road in Illinois; that they did not undertake to carry the plaintiff over it; and did not, by their negligence, cause the injury of which he complains; but that all these acts and proceedings were, in legal contemplation, the acts and proceedings of the natural persons who were actually engaged in promoting the same.

Can then two railroad corporations, having connecting lines, thus unite their business, for the purpose of promoting their common interest; charter another connecting road in furtherance of the same policy; hold themselves out to the public as carriers over the whole route; enter into contracts accordingly; receive the benefit of those contracts; and then, when liabilities arise, interpose the violation of their own charters to shield them from responsibility? Such a defense is shocking to the moral sense, and although it appears to have some support in judicial opinions, I think it has no foundation in the law.

The doctrine has certainly been asserted on some occasions, that, in all cases where the contracts and dealings of a corporation are claimed to be invalid for want of power to enter into the same, a comparison must be instituted between those contracts and dealings and the charter, and, if the charter does not appear to embrace them, then that they must be adjudged void to all intents and purposes, and in all conceivable circumstances. The reasoning on which this doctrine has been usually claimed to rest denies, in effect, that corporations can, or ever do, exceed their powers. They are said to be artificial beings, having certain faculties given to them by law, which faculties are limited to the precise purposes and objects of their creation, and can

no more be exerted outside of those purposes and objects than the faculties of a natural person can be exerted in the performance of acts which are not within human power. In this view these artificial existences are cast in so perfect a mould that transgression and wrong become impossible.

The acts and dealings of a corporation, done and transacted in its name and behalf by its board of directors, vested with all its powers, are, unless justified by its charter, according to this reasoning, the acts and dealings of the individuals engaged in them, and for which they alone are responsible. But such, I apprehend, is not the nature of these bodies. Like natural persons, they can overleap the legal and moral restraints imposed upon them; in other words, they are capable of doing wrong. To say that a corporation has no right to do unauthorized acts is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons.

I think this doctrine of theoretical perfection in corporations would convert them practically into most mischievous monsters. A banking institution, through its board of directors, may invest its funds in the purchase of stocks or cotton, and every holder of its stock may acquiesce, expecting to profit by the speculation. If the enterprise is successful, the corporation and its stockholders gain by the result. If a depression occurs in the market, and disaster is threatened, the doctrine that a corporation can never act outside of its charter enables it to say, "this is not our dealing," and the money used in the adventure may be unconditionally reclaimed from whatever parties have received it in exchange for value; while the injured dealer must seek his remedy against agents perhaps irresponsible or unknown. Corporations may thus take all the chances of gain, without incurring the hazards of loss. Familiar maxims of the law must be reversed. In the relation of private principal and agent, the adoption of an agent's unauthorized dealing is equivalent to an original authority; and the adoption is perfect when the principal receives the proceeds of that dealing. Corporations may practically act in the same manner. The proceeds of unauthorized adventures may be received and become blended with their legitimate business and funds so as to be wholly undistinguishable; but, as the adventures themselves were, in judgment of law, impossible, considered as corporate transactions, so they cannot become possible upon any principle of ratification or estoppel. If we say there is an utter absence of power or faculty to engage in the dealing, it is a self-evident proposition that no rule of estoppel can change the result. * * *

One of the sources of error in reasoning upon legal as well as other questions is inexactness in the use of language, or, perhaps, in the

imperfectness of language, to express the varieties of thought. It is a self-evident truth, that a natural person cannot exceed the powers which belong to his nature. In this proposition we use words in their literal and exact sense. In the same sense it is a truth equally evident that a corporation cannot exceed its powers; but this is only asserting that it cannot exercise attributes which it does not possess. As an impersonal being, it cannot experience religious emotion, or feel the moral sentiments. Corporations are said to be clothed with certain powers enumerated in their charters or incidental to those which are enumerated, and it is also said they cannot exceed those powers; therefore, it has been urged that all attempts to do so are simply nugatory.

The premises are correct when properly understood; but the conclusion is false, because the premises are misinterpreted. When we speak of the powers of a corporation, the term only expresses the privileges and franchises which are bestowed in the charter; and when we say it cannot exercise other powers, the just meaning of the language is, that as the attempt to do so is without authority of law, the performance of unauthorized acts is a usurpation which may be a wrong to the State, or, perhaps, to the shareholders. But the usurpation is possible. In the same sense natural persons are under the restraints of law, but they may transgress the law, and when they do so they are responsible for their acts. From this consequence corporations are not, in my judgment, wholly exempt. The privileges and franchises granted are not the whole of a corporation. Every trading corporation aggregate includes an association of persons having a collective will, and a board of directors or other agency in which that will is embodied, and through which it may be exerted in modes of action not expressed in the organic law. Thus, like moral and sentient beings, they may and do act in opposition to the intention of their creator, and they ought to be accountable for such acts.

* * *

But the doctrine that corporations can never be bound by engagements not justified by the grant of power from the State is next defended on a different ground. Although it be conceded that they are present and acting as legal persons or entities when such engagements are entered into, it is said that all contracts in excess of the rightful power possessed by corporations are illegal and, therefore, void. This is an argument totally different from the one which has been so far examined, because it necessarily imputes the making of the contract to the corporate person or being; whereas the doctrine which I have endeavored to refute denies that proposition. The very point of the supposed illegality consists, or at least it may consist, in the performance of acts perfectly lawful in themselves, but which, being done by a corporation and not by individuals, are pronounced illegal because they are so done without authority contained in the charter.

But is it true that all contracts of corporations for purposes not embraced in their charters are illegal, in the appropriate sense of that term? This proposition I must deny. Undoubtedly such engagements may have the vices which sometimes infect the contracts of individuals. They may involve a malum in se or a malum prohibitum, and may be void for any cause which would avoid the contract of a natural person. But where no such vices exist, and the only defect is one of power, the contract cannot be void because it is illegal or immoral. Such a doctrine may have some slight foundation in the earlier English railway cases (East Anglian Railways' Co. v. Eastern Counties Railway Co., 7 Eng. L. & Eq. 509; McGregor v. Official Manager of the Deal & Dover Railway Co., 16 Eng. L. & Eq. 180); but it was never established, and is not now received in the English courts (Mayor of Norwich v. Norfolk Railway Co., 30 Eng. Law and Eq. 120; Eastern Counties Railway Co. v. Hawkes, 35 Eng. L. & Eq. 8, 37). The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but with the slight exception named, there is an entire absence, not only of adjudged cases, but of even judicial opinion or dicta, for the proposition that mere want of authority renders a contract illegal.

Such a proposition seems to me absurd. The words ultra vires and illegality represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority of the board of directors and under the corporate seal, for the building of a church or college or an alms-house, would be clearly ultra vires, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it still would be ultra vires, but no wrong would be committed and no public interest violated. So a manufacturing corporation may purchase ground for a schoolhouse or a place of worship for the intellectual, religious and moral improvement of its operatives. It may buy tracts and books of instruction for distribution amongst them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although ultra vires, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no State policy in restraint of that business.

To illustrate the subject in another manner: An agent may make a contract in the name and behalf of his principal, but not within the scope of his agency. If the consideration and purpose of such a contract be lawful, it may be void as against the principal, but not on the ground of illegality. A corporation is not an agent of the State, or, in any strict sense, of the shareholders. But it derives its pow-

ers from the State, and it may transcend those powers for purposes which, in themselves considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal, because they violate no public interest or policy. My meaning in short is, that the illegality of an act is determined in its quality and does not depend on the person or being which performs it.

There has been, I think, some want of reflection, even in judicial minds, upon the reasons and policy which mainly govern in the granting of charters to corporations, with certain specified powers and no others. A private or trading corporation is essentially a chartered partnership, with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy. It is also something more than a partnership, because the legal or artificial person becomes vested with the title to all the estate and capital contributed, to be held and used, however, in trust for the shareholders. Now, in a well-regulated unincorporated partnership, the articles entered into by the associates specify the objects of their association. But, suppose the same associates desire a charter of incorporation for the more convenient prosecution of the same business, and obtain one. We shall find it to contain the like specification, which becomes the grant or power from the sovereign authority of the State. I am speaking of powers and privileges granted which are not, in their essential nature, corporate or public franchises as distinguished from the private enterprises which any class of citizens may embark in; and, with the exception of municipal or governmental charters, the class of powers here referred to will be found to cover nearly the whole field of corporate rights.

It is not difficult, then, to see the reason and policy which underlie such grants. The associates ask for a charter in order to carry on their business with greater advantages; and the same reason exists for a specification of the purposes of their organization as in the case of an association without a charter. The charter takes the place of the articles of agreement, and becomes the appropriate rule of action. No public interest or policy is involved, because the objects of the grant are not of a public nature. The powers and rights specified are identical with those which any private person or association of persons may exercise. If those who manage the concerns of a simple partnership deal with the funds in a manner or for purposes not specified, their acts are ultra vires; and if the directors of such a corporation as I am here speaking of do the same thing, their acts are also ultra vires in the same sense and no other. To apply the word "illegality" to such transactions is to confound things of a totally different nature. It is only private interests which are affected by them; and there is no statute or rule of the common law by which they become public offenses. * * *

Let us now concede that the unauthorized contracts of a corporation are illegal in the sense contended for. It by no means follows that they are never to be enforced. An agreement declared by statute to be void cannot be enforced because such is the legislative will. But when without any such declaration it is simply illegal, it is capable of enforcement where justice plainly requires it. Circumstances may and often do exist, which estop the offender from taking advantage of his own wrong. The contract may be entered into on the other side without any participation in the guilt and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract. A railroad corporation for example may purchase iron rails and give its obligation to pay for them with a design to sell them again on speculation instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is, therefore, said to be illegal. But if the corporation is deemed to make the contract—in other words, if, as I have above shown, it is a legal possibility for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party who knows nothing of the unlawful purpose? So an incorporated bank may purchase land, having power to do so, for a banking-house, but actually intending to speculate in the transaction. This is also ultra vires, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being in pari delicto? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals.

As I am not contending that the unauthorized dealings of a corporation are never to be questioned, the object of this discussion has been to ascertain the true ground on which they can be impeached where they are not attended by the vices which are fatal to private contracts also. I have shown, I trust, 1. That such dealings are possible in law, as they often take place in fact: in other words, that it is in the nature of these bodies to overleap the restraints imposed upon them. 2. That a transgression of this nature is a simple excess of power (using that word to express the rules of action prescribed in their charters, and by which they ought to regulate their conduct), but is not tainted with illegality so as to avoid the contract or dealing on that ground. This proposition, it seems hardly necessary to repeat, is applied only to transactions which involve or contemplate no violation of the code of public or criminal law, but on the contrary are innocent and lawful in themselves. 3. Even illegal contracts in the proper sense are not universally and indiscriminately to be adjudged void; and especially this is not so where the offender alleges his own wrong to avoid just responsibility, the other party being innocent of the offense.

If these negative conclusions cannot be denied, it follows that contracts and dealings such as I have been speaking of are to be condemned by the courts only on the ground that they are a breach of the duty which private corporations owe to the stockholders to whom the capital beneficially belongs. It is the undoubted right of stockholders to complain of any diversion of the corporate funds to purposes unauthorized in the charter. This, as a general principle, cannot be too strongly asserted; and by this principle justly applied to particular instances, the question in such cases is to be resolved. The original subscribers contribute the capital invested, and they and those who succeed to their shares are always in equity the owners of that capital. But legally the ownership is vested in the corporate body impressed with the trusts and duties prescribed in the charter. In these relations we have the only true foundation of the plea of ultra vires.

That term is of very modern invention, and I do not think it well chosen to express the only principle which it can be allowed to represent in cases of this nature. It is not to be understood as an absolute and peremptory defense in all cases of excess of power, without regard to other circumstances and considerations. It is not to be looked upon as a plea which denies the actual exertion of corporate power when a corporation enters into an engagement which, according to its charter, it ought not to make; but, because such was the nature of the contract, it presents the breach of trust or duty to the shareholders as an excuse for the non-performance. And I do not deny the validity of this excuse in many cases, I may say in all cases where it can be received without doing greater injustice to others. If the person dealing with a corporation knows of the wrong done or contemplated, and he cannot show the acquiescence of the shareholders, he ought not to complain if he cannot enforce the contract. Aside from the law of corporations, agreements which involve or propose a violation of trust will not be enforced by the courts where no greater equities demand it. Corporate bodies are more than mere agents. They are more than a partner who manages as the agent of his associates. Their powers are undelegated. They are the legal owners of the capital, or estate, and they have capacity to deal with it in contravention of duty or trust. * * *

But little more need be said in reference to the particular case now before us. If the defendants did not become liable for the breach of their undertaking to carry the plaintiff, or of their duty resulting from that undertaking, I can see no ground for holding them accountable as simple wrongdoers. If their contract was ultra vires, and that defense to an action upon it must be received as absolute and peremptory—if no principle of estoppel or rule of justice can be urged against that defense—then it is more clear that the simple wrong to the plaintiff's person was also ultra vires. It was with considerable difficulty that the liability of a corporation in any case for

a pure tort was ever established; and they are never so liable except when engaged in the performance of some duty or undertaking in respect to which accountability arises. If the defendants' express undertaking was absolutely void, so that no duty could arise thereupon, the implied undertaking resulting from the actual attempt to carry the plaintiff as a passenger is encountered by the same objection; and there is nothing left of the transaction except a pure and simple tort, committed by the defendants' servants while not engaged in any business which could bring responsibilities upon the defendants themselves. I think it plain that this theory of liability will not sustain the plaintiff's case. * * *

SELDEN, J.[44] * * * No court has ever held that the defense of ultra vires rested upon any such ground, as that the contract sought to be enforced could not be considered as an act of the corporation. The object of the distinction, so frequently drawn, between natural persons and corporations as mere artificial existences with no powers or faculties except such as are derived from their charters, is simply to show that the latter cannot legitimately and rightfully exercise any powers but those with which they are endowed by the law which creates them, and not that they may not wrongfully exceed the just limits of those powers.

The case of Barry v. Merchants' Exchange Company, 1 Sandf. Ch. 280, will serve to illustrate the force and application of the distinction. The question in that case was, whether a corporation, created for the purpose of erecting a building to be used as a public exchange, in the city of New York, had power to borrow money to enable it to accomplish the object of the incorporation, no provision conferring this power being contained in the charter. The vice-chancellor, in deciding this question in the affirmative, said: "Every corporation, as such, has the capacity to take and grant property, and to contract obligations in the same manner as an individual." This remark presents one theory in regard to the nature of corporations, which is, that unless specially restrained, they have the same power to bind themselves by contract as any natural person. The distinction referred to stands opposed to this theory, and is designed to show that, as corporations have no existence independent of their charters, they can, of course, have no powers except such as are specifically conferred.

When a corporation, sued for a breach of contract, sets up as a defense its own want of power to enter into the contract, two questions are involved: first, whether the contract was, in truth, beyond the corporate powers; and second, if so, whether this is available as a defense. It is only in reference to the first of these questions, and to prove that the contract was really ultra vires, that the argument has been resorted to, that a corporation has no natural powers.

[44] A part of the opinion is omitted.

The excess of power being established, the question whether this constitutes a valid defense depends upon entirely different considerations.

The assumption, therefore, that the doctrine, which declares the unauthorized contract of a corporation to be void, rests in any degree upon the theory that a corporation can never be said to have done anything but what it had a legitimate right to do, is wholly unwarranted; and hence the irresistible logic with which it is shown that corporations must necessarily partake of the imperfection which attaches to all created things, is wholly without force in its application to the present case. Corporations, as well as natural persons, may no doubt err. They may exceed their powers and violate their charters, and may be held responsible for so doing. Were it otherwise, they could never be made liable for a tort; nor could they be proceeded against by quo warranto. The statute which authorizes the attorney-general to file an information in the nature of a quo warranto against an offending corporation (2 R. S. 583, § 39), assumes that corporations may transgress the limits prescribed by their charters. Subdivision 5 of the section referred to provides that the proceeding may be instituted "whenever it (the corporation) shall exercise any franchise or privilege not conferred upon it by law."

The real ground upon which the defense of ultra vires rests, and the only one upon which it has ever, to any extent, been judicially based is, that the contracts of corporations which are unauthorized by their charters are to be regarded as illegal, and, therefore, void. There are three classes of illegal contracts, viz.: those which are mala in se—i. e., which embrace something which the law deems in and of itself criminal or immoral; 2d, those which violate the provisions of some statute, and are hence called mala prohibita; and 3d, those which contravene some principle of public policy. Corporations may make contracts falling within either of the two first of these classes, and such contracts are no doubt subject to the same rules as if made by individuals. Of course, where the only objection to the contract of a corporation is that it exceeds the corporate powers, it cannot be considered as malum in se; and although, in this State, where we have a statute (1 R. S. 600, § 3) expressly enacting that no corporation shall exercise any corporate powers except such as their charters confer, the contrary might, with much plausibility, be contended. I shall, nevertheless, concede, for the purposes of this case, that such contracts do not belong to the class styled mala prohibita.

But the contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy. That contracts which do in reality contravene any principle of public policy are illegal and void is not and cannot be denied. The doctrine is universal. There is no exception. Although the unauthorized contract may be neither malum in se nor malum prohibitum, but, on the contrary, may be for some benevolent or worthy object,

as to build an alms-house or a college, or to purchase and distribute tracts or books of instruction, yet, if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwithstanding their praiseworthy nature, are illegal and void. Those, therefore, who hold that corporations are liable upon their contracts, notwithstanding they were made without authority, are forced to contend that no principle of public policy is violated by such contracts. This is the ground which they do take, and which, it is obvious, they must necessarily take, in order to sustain their position. Here, then, we have an issue made up, which, if I am right, is decisive of the question under consideration.

What, then, is the argument, by which it is sought to be shown that there is no principle of public policy involved in this question of the liability of corporations for their unauthorized acts? It is said that a private corporation is simply a chartered partnership, possessing certain attributes conferred by its charter for the purpose of enabling it the more conveniently to transact its business: that, even in unincorporated partnerships, the articles of copartnership always specify the objects of the association; and that, when such associations choose to become incorporated, those objects are, for the same reason, specified in the charter: that the charter simply takes the place in this respect of the articles of agreement, in the case of an unincorporated partnership: that, as the objects of such associations, although incorporated, are of a private nature, there is no question of public policy involved; and that no public interest requires that the transactions of the corporations should be kept within its chartered limits.

If we admit the soundness of this argument, and assume that the directors of a corporation are not under any public obligation to keep within their chartered powers, but are to be regarded simply as the agents of the corporators, so that any excess of power on their part amounts simply to a breach of trust toward their principals, it would not follow that the corporation is liable upon its unauthorized contracts. But I apprehend there are serious objections to this view of the nature of corporations, and of the effect of their charters.

In the first place, if there is no public interest involved, how is it possible to justify the creation of private corporations at all? Such corporations are endowed with valuable franchises and privileges, which give them great advantages over mere private citizens, whether individual or associated. The grant of such privileges upon the principles for which some of my associates contend would be a pure piece of legislative favoritism, which should be indignantly condemned. In this country, if in no other, it is held to be the duty of government to protect the people in the enjoyment of equal rights and privileges, and not to use its power for the special benefit of its favorites. Every privilege or advantage given to one man or set of men is necessarily at the expense of others; and it is against the

fundamental principles of our government that this should be done, unless required by interests of a public nature. No doubt these principles are frequently violated, and corporate powers and privileges are conferred which no public interest demands; but, nevertheless, such interest is the ostensible reason for the grant in every case. * * *

The fact that a mere excess of power on the part of a corporation, by the assumption of privileges not conferred, affords ground for a quo warranto, is in itself proof that the public has an interest in keeping such bodies within the limits of their charters. But it is said that the proceeding by quo warranto is of a purely civil nature, designed solely to try a mere civil right, and that it in no manner assumes that any public right or interest has been infringed. Upon this position I take issue. In the first place the assertion derives no support from, if it is not in direct conflict with, the legislative enactments on the subject. Not one of the provisions of the section by which the attorney-general is authorized to institute proceedings in the nature of a quo warranto contemplates injury to any private right as the ground of the proceeding. He is authorized to act in the following cases, viz.: Whenever a corporation shall "1st. Offend against any of the provisions of the act or acts creating, altering or renewing such corporation; or, 2d. Violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or, 3d. Whenever it shall have forfeited its privileges and franchises by nonuser; or, 4th. Whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or, 5th. Whenever it shall exercise any franchise or privilege not conferred upon it by law." (2 R. S. 583, § 39.)

Not one of these subdivisions contemplates a case of injury to the private interests of stockholders. They all, without exception, relate to violations, not of individual rights, but of public law. These provisions, therefore, strongly, and, as I think, conclusively, repel the idea that a quo warranto is a mere civil remedy, the object of which is to redress or prevent a private injury. The proceeding is not only public and quasi criminal in form, but is not in its nature adapted to the enforcement of any mere private right. The rights of stockholders in corporations are abundantly protected against every unauthorized assumption of power, or any breach of trust on the part of their managing officers. If the violation of duty or breach of trust is only threatened, a court of equity will prevent it by injunction, and if committed will afford the proper redress. There is neither occasion for, nor propriety in, a resort to the proceedings by quo warranto for any mere private purpose, and I hazard nothing in saying that such is not the nature of that proceeding. If this conclusion is right, it inevitably follows that the assumption of any unauthorized power by a corporation is a violation of public policy and public right, and, therefore, illegal.

This, then, is the true foundation of the defense we are considering. It is permitted upon the same principle and for the same reason that a private individual is permitted to plead his own illegal act as a defense to a suit brought to enforce a contract which public policy forbids, viz.: To discourage and restrain such violations of law. There are, no doubt, cases in which a corporation would be estopped from setting up this defense, although its contract might have really unauthorized. It would not be available in a suit brought by a bona fide indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. * * *

My conclusion, therefore, is that the contract of the defendants to transport the plaintiffs from Chicago to Toledo was illegal and void, they having, as we have seen, no power under their charters to enter into the engagement for running their cars on joint account between those two places. It does not follow, however, that they are not liable to the plaintiff in this action. The complaint is founded upon the duty which rested upon the defendants, growing out of the relation in which they stood to the plaintiff, to take care that he should not be injured by their negligence. If this duty could only arise out of some contract between the parties, then the conclusion arrived at would be fatal to the recovery. The contract actually made by the defendants to transport the plaintiff can form no part of the plaintiff's case, and he must recover, if at all, irrespective of that contract.

It is said that if the contract was ultra vires and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted while attempting to perform it. But this, I apprehend, by no means follows, though it is probably true so far as the duty to observe due care grew out of the contract. The plaintiff's claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or who has been run over by a train of cars when crossing the railroad track. The duty to observe care in these cases arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct as not through their negligence to inflict injury upon others.

It is unnecessary to cite authorities to show that corporations are liable for the culpable negligence of their servants or agents while engaged in the business of the corporation, in the same manner as individuals are liable for the negligence of themselves or their servants. It will scarcely be doubted that if the defendants' cars, through the carelessness of their employees, had run over the plaintiff, while passing upon a highway across the track of any portion of the road used by them, the corporation would have been liable. They could not set up that having no power to run their cars beyond the limits prescribed by their respective charters, all acts outside of those limits must be regarded as the acts of the individuals performing them, and not of the corporation. We have already seen that corporations may exceed their powers and may perform unauthorized acts, and incur responsibilities thereby. There is no doubt that all that was done under the arrangement between the defendants, found by the referee, unauthorized and contrary to law, is nevertheless to be treated as done by the corporations themselves. The business was carried on under the direction of their managing officers, with their property and for their benefit, and they cannot now be heard to deny that it was done by them. It follows that at least in respect to all persons with whom they had no conventional relations, their responsibilities would be precisely the same as if the business in which they were engaged was lawful.

To test the liability of the defendants, therefore, in this case, it is necessary to inquire what would be the responsibility of railroad companies in general toward persons sitting in their cars, but whom they have made no contract to transport. This must depend upon the circumstances under which the individuals had entered the cars. If they were there as mere trespassers, without shadow of right, the company would not, perhaps, be responsible for any injury they might sustain, through the negligence of its servants. But if, on the other hand, the entry into and remaining in the cars was with the assent, express or implied, of the company, and injury should result from the negligence of the latter or its agents, the company would, I think, be responsible. It was held by this court in the case of Nolton v. Western Railroad Corporation, 15 N. Y. 444, 69 Am. Dec. 623, that when a railroad company voluntarily undertakes to carry a passenger upon their road, although without compensation, if such passenger is injured by the culpable negligence of the agents of the company, the latter is liable, in the absence of any express agreement exempting it. The principle of that case is applicable to this. Although here, if we lay aside the contract, there was no undertaking to transport the plaintiff, either with or without compensation; yet this can make no difference, as the liability in such cases arises, not from any contract express or implied, but from the universal obligation of all persons to avoid injury to others through their negligence.

Suppose, while standing upon your own premises, you accidentally,

but through sheer carelessness, discharge a gun and wound a person walking upon the highway, you are clearly liable for the injury. If the person injured, instead of being upon the highway, were in your own house with your assent, would not your liability be the same? No one can doubt it. Suppose, then, instead of being in a house with the owner's assent, the individual is in the car of a railroad company with the consent of the company, would he not have the same right to immunity from injury through the negligence of the company or its agents? This is self-evident. The company might not be liable in such a case for the careless discharge of a gun by one of its servants, because using the gun would be no part of the servant's duty to his employers. But if, through the carelessness of the engineer, the boiler of the engine should burst, and injury should ensue, the liability of the company would be clear. So, if the injury arose from a collision, running off the track, or any such cause.

It will be seen, therefore, that the question of responsibility for injuries sustained from negligence, when the person injured is within the domain or upon the premises of the party guilty of the negligence, turns upon the inquiry whether he is there lawfully or as a trespasser. It is true that when the negligence occurs in the course of the performance of some gratuitous service by the party guilty of the negligence for the party injured, the former is only liable for gross negligence; but no question on this subject arises in the present case, as the proof in that respect will be presumed to have been such as to support the judgment, since nothing appears to the contrary.

Was the plaintiff, then, in the defendants' cars as a mere trespasser, or was he there lawfully, as between him and the defendants? To this question there can be but one answer. The defendants can never allege that the plaintiff was in their cars as a trespasser, when he was there by their express assent. The contract between him and the company, it is true, for reasons of policy could not be enforced. The defendants might at any time have repudiated it, and required the [plaintiff] to leave the cars; and if he refused might thereafter have treated him as a trespasser. But neither his entry into the cars, nor his remaining there until required to leave, could ever be regarded by the defendants as an infringement upon their legal rights.

It may be said that the plaintiff by consenting to travel in the defendants' cars became a participator in their unlawful conduct, and hence is not entitled to recover; but for this position there is not a shadow of authority. The law offended against by entering into the illegal contract in this case is a law of restriction upon the defendants and not upon the plaintiff. The implied prohibitions which were violated rested solely upon them. There was no law prohibiting the plaintiff from traveling in their cars. I have already adverted to the rule that where the illegality of the contract consists in the violation of some law, the prohibitions of which are aimed at one of the parties only, the other party is to be treated as comparatively innocent,

and may have relief against the more guilty party even in an action ex contractu. If, then, he is entitled to enforce a mere equity against the other party a fortiori may he claim redress for injuries consequent upon their tortious acts. He is so far regarded as particeps criminis, that he forfeits the whole benefit of his contract. He could not recover for any failure of the company to transport him in due time or to transport him at all, whatever damages he might thereby sustain; but he cannot be said, like an outlawed felon, to have caput lupinum and thus to be liable to be knocked on the head like a wolf or to have his limbs broken with impunity. (4 Bl. Com. 320.) Upon these grounds I think the recovery was right, and that the judgment should be affirmed.

CLERKE, J., delivered an opinion for affirmance, on the ground last stated by SELDEN, J. DENIO, J., was for reversal. All the other Judges were for affirmance, but without passing upon the questions discussed by COMSTOCK, C. J., and SELDEN, J.

Judgment affirmed.

CENTRAL TRANSP. CO. v. PULLMAN PALACE CAR CO.

(Supreme Court of the United States, 1891. 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55.)

GRAY, J.[45] * * * The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities, which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws. * * *

[45] A part of the opinion is omitted.

DIRECTORS, ETC., OF ASHBURY RAILWAY CARRIAGE & IRON CO., Limited, v. RICHE.

(House of Lords, 1875. L. R. 7 H. L. 653.)

The third clause of Memorandum of Association of the Ashbury Railroad Carriage & Iron Company provided "The objects for which the company is established are to make or sell, lend or hire railway carriages and waggons, and all kinds of railway plant fittings, machinery, rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase and sell as merchants, timber, coal, metals, or other materials; and to buy and sell any such materials on commission or as agents. In 1865, an agreement was entered into between the directors of the company, Messrs. Riche, railway contractors, and Messrs. Gillon and Bertsoen to form a company (société anonyme) for the purpose of working a concession obtained by Messrs. Gillon and Bertsoen from the Belgium Government for the construction of a line of railway from Antwerp to Tourney in Belgium. It was agreed that Messrs. Riche were to have the construction of the line. The Ashbury company to purchase the Concession from the Concessionaires for £70,000 and to supply the société anonyme with the requisite funds.

Messrs. Riche began and for some time continued the works for the construction of the line; and for some time the Ashbury Company paid money to the société anonyme to which the Messrs. Riche became entitled.

At the annual meeting of the Ashbury Company in 1867, a resolution was passed, as a result of the stockholders' disapproval of the directors' action in financing the working of this concession, by the terms of which the directors were to take over the Concession and indemnify the Company.

The company repudiated the contract with the Messrs. Riche as ultra vires. The Messrs. Riche brought the present action against the Ashbury Company to recover damages for breach of contract.

The Court of Exchequer entered a verdict for the plaintiff, Riche. This judgment was taken on error to the Exchequer Chamber, where, the Judges being equally divided in opinion, the judgment stood affirmed, and error was brought to the House of Lords.[46]

THE LORD CHANCELLOR (Lord CAIRNS),[47] [after discussing the purposes for which the company was formed, and the construction of the contract by the dissenting judge in the Court of Exchequer proceeds:]

Those being the results of the documents to which I have referred, I will ask your Lordships now to consider the effect of the Act of Parliament—the Joint Stock Companies Act of 1862—on this state of things. And here, my Lords, I cannot but regret that by the two

[46] Statement of facts substituted. [47] A part of the opinion is omitted.

Judges in the Court of Exchequer the accurate and precise bearing of that Act of Parliament upon the present case appears to me to have been entirely overlooked or misapprehended; and that in the Court of Exchequer Chambers, speaking of the opinion of those learned Judges who thought that the decision of the Court of Exchequer should be maintained, the weight which was given to the provisions of this Act of Parliament appears to me to have entirely fallen short of that which ought to have been given to it. Your Lordships are well aware that this is the Act which put upon its present permanent footing the regulation of joint stock companies, and more especially of those joint stock companies which were to be authorized to trade with a limit to their liability.

The provisions under which that system of limiting liability was inaugurated, were provisions not merely, perhaps I might say not mainly, for the benefit of the shareholders for the time being in the company, but were enactments intended also to provide for the interests of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind. And I will ask your Lordships to observe, as I refer to some of the clauses, the marked and entire difference there is between the two documents which form the title deeds of companies of this description—I mean the Memorandum of Association on the one hand, and the Articles of Association on the other hand. With regard to the memorandum of association, your Lordships will find, as has often already been pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of the powers of a company to be established under the Act. With regard to the articles of association, those articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, the rights and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is so done is ultra vires, not only of the directors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act extra vires the directors, but intra vires the company. * * *

Now, my Lords, if that is so—if that is the condition upon which the corporation is established—if that is the purpose for which the corporation is established—it is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified. * * *

Now, my Lords, bearing in mind the difference which I have just taken the liberty of pointing out to your Lordships between the memorandum and the articles, we arrive at once at all which appears to me to be necessary for the purpose of deciding this case. I have used the expressions extra vires and intra vires. I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression "illegality."

In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is malum prohibitum or malum in se, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, "That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company," the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing.

But, my Lords, if the shareholders of this company could not ab ante have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made. I endeavoured to follow as accurately as I could the very able argument of Mr. Benjamin at your Lordships' Bar on this point; but it appeared to me that this was a difficulty with which he was entirely unable to grapple. He endeavoured to contend that when the shareholders had found that something had been done by

the directors which ought not to have been done, they might be authorized to make the best they could of a difficulty into which they had thus been thrown, and therefrom might be deemed to possess power to sanction the contract being proceeded with. My Lords, I am unable to adopt that suggestion. It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the whole company could not do, and that then, the shareholders finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized.

My Lords, if this be the proper view of the Act of Parliament, it reconciles, as it appears to me, the opinion of all the Judges of the Court of Exchequer Chamber; because I find Mr. Justice Blackburn, whose judgment was concurred in by two other Judges who took the same view, expressing himself thus (Law Rep. 9 Ex. 262): "I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified." My Lords, that sums up and exhausts the whole case. In my opinion, beyond all doubt, on the true construction of the statute of 1862, creating this corporation, it appears that it was the intention of the Legislature, not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description. If so, according to the words of Mr. Justice Blackburn, every Court, whether of law or of equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as extra vires, and wholly null and void, and to hold also that a contract wholly void cannot be ratified.

My Lords, that relieves me, and, if your Lordships agree with me, relieves your Lordships from any question with regard to ratification. I am bound to say that if ratification had to be considered I have found in this case no evidence which to my mind is at all sufficient to prove ratification; but I desire to say that I do not wish to found my opinion on any question of ratification. This contract, in my judgment, could not have been ratified by the unanimous assent of the whole corporation.

I have only to add to what I have already said, that I observe that some cases have been referred to here—those arising out the Agriculturist Cattle Insurance Company in your Lordships' House, Spackman v. Evans, Law Rep. 3 H. L. 171, Evans v. Smallcombe, Id. 249, and Houldsworth v. Evans, Id. 263, and the case of the Phosphate of Lime Company v. Green in the Court of Common Pleas, Law Rep. 7 C. P. 43—as if they had some bearing on the present ques-

tion. Those cases have a bearing upon some of the observations with which I have troubled your Lordships. They are cases which illustrate extremely well what I have said just now, that the articles of association of a company of this kind are the documents which define the power of directors as between themselves and the company. In those cases which I have mentioned the whole question was, whether the directors had gone beyond the powers which were entrusted to them, and by which their authority was limited under the articles of association, or whether that which had been agreed to had been duly performed. In no one of those cases was there any question as to whether the power of the whole company had been exceeded. In the cases of the Agriculturist Cattle Insurance Company [Spackman v. Evans, L. R. 3 H. L. 171; Evans v. Smallcombe, Id. 249; Houldsworth v. Evans, Id. 263] no person ever doubted that if the shareholders had assembled together they might have released from the obligation of a partnership contract inter se (for there was no question of outside creditors) any member of the company upon any terms that they thought fit. The only question was whether the directors had released those who were released upon terms which they were authorized to make, or whether, if they had not released them upon such terms, the release subsequently became known to the company and was sanctioned by the company. The shareholders might have passed a resolution sanctioning the release, or altering the terms in the articles of association upon which releases might be granted. If they had sanctioned what had been done without the formality of a resolution, it was quite clear that that would have been perfectly sufficient. So also in the case of the Phosphate of Lime Company [L. R. 7 C. P. 43] the question was, whether that had been done by the sanction of the company which clearly might have been done by a resolution passed by the company. Those cases have no application whatever to the present case. The present case stands upon the power, not of the directors alone, but of the whole company as settled by the Act of Parliament.

My Lords, for the reasons which I have thus endeavoured to express, I submit to your Lordships and move your Lordships that the judgment in the present case should be reversed, and judgment entered for the Defendants.[48]

[48] The concurring opinions of Lords Chelmsford, Hatherley, O'Hagan, and Selborne are omitted.

Accord: Davis et al. v. Old Colony Railroad, 131 Mass. 258, 41 Am. Rep. 221 (1881).

Contra: State Board of Agriculture v. Citizens' Street Railway Company, 47 Ind. 407, 17 Am. Rep. 702 (1874).

Compare Riche v. Ashbury Park Railway Co., 9 Ex. 274, 292 (1874).

II. Executory and Partly Executed Contracts

HARRIS et al. v. INDEPENDENCE GAS CO.

(Supreme Court of Kansas, 1907. 76 Kan. 750, 92 Pac. 1123, 13 L. R. A. [N. S.] 1171.)

Mason, J.[49] Cornelius Carr and his wife executed to the Independence Gas Company an oil and gas lease—that is, an instrument granting the right to explore a tract of land for oil or gas, and to appropriate either if found. The company is a Kansas corporation, and, at the time of the execution of the lease, the only purpose mentioned in its charter was "to dig or mine for natural gas, and sell the same for heat and lighting purposes." Later, an amendment was made adding thereto the mining and selling of oil. What are called the "gas rights" under the lease have been transferred to another gas company, and no point is raised with regard to them. The Carrs, claiming that the lease so far as it related to oil was void, because at the time it was executed the lessee had no authority to engage in the oil business, undertook to grant the oil privileges anew to C. C. Harris, who, upon that ground, brought a suit against the Independence Company to cancel all of its contract excepting that portion relating to gas—joining his grantors as coplaintiffs. The trial court sustained a demurrer to a petition setting out substantially these facts, and this proceeding is brought to review that ruling.

The defendant maintains: (1) that it had the implied power to produce and market oil as an incident to the express power granted to it to produce and market gas; (2) that if it originally lacked such power the defect was supplied by the charter amendment; and (3) that even if it had no authority to enter into the contract the plaintiffs cannot take advantage of the fact. It will only be necessary to consider the questions involved in the third proposition.

Although the decisions relating to the doctrine of ultra vires are characterized by some confusion, as well as by much conflict, they admit of classification into fairly well-defined groups, and exhibit a development in the direction of restricting the scope of its operation. Those courts which accord it the most favorable treatment—allow it the largest field of action—proceed upon the conception that a corporation, being the creature of the state, possesses no power whatever beyond that granted in its charter, and cannot directly or indirectly acquire rights, or incur liabilities, under any contract not thereby authorized. They refuse, under any circumstances, to enforce or give effect to an unauthorized contract as such, but, where it

[49] A part of the opinion, reviewing the authorities, is omitted.

has been acted upon, will protect the parties against hardship and injustice, by allowing whatever relief may be suited to the facts of the case—for instance, by permitting either party to recover money or property which has been parted with in the transaction, or to have compensation therefor. The cases illustrating this treatment of the matter are collected in 29 A. & E. Encycl. of L. 54, note 2. The theory is consistent and logical, but its practical effect is so to circumscribe the power of the court as to make the relief furnished at times inadequate to the occasion.

In a larger number of jurisdictions, although the same conception of corporate capacity is adopted, its effect is greatly changed by the application of another principle. Here the courts concede that a corporation has no power to make a contract except such as is conferred by its charter, expressly, or by necessary implication. But they hold that as it must have some discretion in the manner of carrying out the purposes of its creation—some freedom of action —it is amenable to the same rules of conduct as a natural person, and may estop itself to question the validity of an agreement it has assumed to make, or may acquire the right to invoke a similar estoppel in its own behalf. Where this theory is accepted, recovery may be had upon a contract which is in fact void, simply because its validity cannot be put in issue. The cases in point are gathered in 29 A. & E. Encycl. of L. 57, note 1.

These cases have been criticised for the use they make of the word "estoppel," as descriptive of the principle upon which they are based. It is argued that, as a corporation must know the terms of its own charter, and as one dealing with it is charged with like knowledge, neither party to an ultra vires contract can be misled in that respect, and therefore there must always be lacking an essential element of what could, with technical accuracy, be called estoppel. This, however, is a mere question of terminology. The requirement that one shall be consistent in conduct—shall not occupy contradictory positions, shall not retain the advantages of a transaction, and reject its burdens—is often spoken of as a form of estoppel. The term is convenient, and, if inaccurate, is not misleading. This rule of estoppel affords a good working hypothesis to accomplish just results. If it fails to accomplish all that might be desired in a practical way, it is because it is not made sufficiently far-reaching. It is generally held to be inapplicable to purely executory contracts, one reason stated being that, "Where neither party has acted upon the contract, the only injustice, caused by a refusal to enforce it, is the loss to the parties of prospective profits, and this is too slight a consideration to weigh against the reasons of public policy for declaring it void and not enforceable." 29 A. & E. Encycl. of L. 49, 50.

It might seem reasonable that a system which attempts not only to protect a party to an ultra vires contract from actual loss, but, where equity requires it, to insure to him the actual fruits of his

bargain, ought, for the sake of completeness and symmetry, to enable him to insist upon the performance even of a purely executory contract. It certainly seems against conscience that one who has entered into a contract in the expectation of deriving a profit from it, may, upon discovering the probability of a loss, repudiate it, and escape responsibility by raising the question of want of corporate capacity. Parties to a contract, who deal with each other upon the assumption that one of them is a corporation, are ordinarily precluded from questioning the validity of its organization. * * *

A large majority of the adjudications on the subject of ultra vires fall into one or the other of the two groups already referred to. The conception of corporate power, upon which they depend, has been styled that of "special capacities," in distinction from that of "general capacities." See article by George Wharton Pepper, on Exercise of Corporate Power, 9 Harvard Law Review, 255. The conception, designated by the latter term, is, in brief, that while a corporation has no right to exceed the limits of its charter it has the power to do so. * * *

No Kansas statute declares that a contract made by a corporation in excess of its legitimate powers shall be void; or in terms permits the question of corporate capacity to be raised by one of the parties. Where it is held that no recovery can ever be had upon an ultra vires contract, as such, whatever relief is afforded is logically made to turn upon whether and how far the agreement has been acted upon. Where a recovery is sometimes permitted under the contract itself, upon the principle of estoppel, the question whether it has been carried out is likewise of manifest importance, there being a difference in degree, at least, between the attitude of one who has merely entered into an engagement in expectation of obtaining an advantage from it, and that of one who has actually reaped its benefits in whole or in part. But the doctrine that only the state can challenge the validity of acts done under color of a corporate charter, if accepted, must necessarily protect an executory contract from collateral attack, equally with one that has been executed. The court is convinced of the soundness of the view that, in the absence of special circumstances affecting the matter, neither party to even an executory contract should be allowed to defeat its enforcement by the plea of ultra vires. The doctrine is logical in theory, simple in application, and just in result. It, of course, does not apply to contracts which are immoral, or which are illegal (as distinguished from merely unauthorized), or to those made by public corporations. Nor does it forbid interference by a stockholder to protect his rights as such.

Upon these considerations the judgment is affirmed.[80]

[80] Compare Jemison v. Citizens' Savings Bank, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482 (1890).
Accord (semble): Farwell & Co. v. Wolf, 96 Wis. 10, 70 N. W. 289, 71 N.

PRESIDENT, ETC., OF BANK OF MICHIGAN v. NILES.

(Supreme Court of Michigan, 1844. 1 Doug. 401, 41 Am. Dec. 575.)

Appeal from the Court of Chancery. (Vide s. c. Walk. Ch. 99.)

The complainants filed their bill in the Court of Chancery, to obtain the specific performance of a contract, entered into between them and the defendant, July 1st, 1839. The complainants thereby bound themselves, within sixty days thereafter, to convey to the defendant certain real estate described in the contract, and to obtain from one Jeremiah H. Pierson, a good and sufficient deed of the property called the Rochester mill property, and convey to him three undivided fourth parts of it; and, in case a mortgage or incumbrance should be created for the purchase money of the mill property, they covenanted to pay the same, and have it released within five years from the date of the contract. They further agreed to deliver to defendant certain certificates signed by him, amounting to $796.63. The defendant, on his part, agreed to execute a mortgage to the complainants for the purchase money to be paid by him, amounting to $28,000, and to include, in addition, in the securities, certain notes, and the amount of the above mentioned certificates. The mortgage was to be executed on the property conveyed to him, and upon the remaining interest which he already possessed in it, as tenant in common.

Within the sixty days, the complainants purchased and obtained a deed for the mill property of Pierson, for $5,000, which they paid and secured to be paid to him. They then made out and executed a deed to the defendant for three-fourths of it, together with the other property they were bound by the contract to convey to him, and were ready and willing to perform their part of the contract.

The defendant demurred; and, the Chancellor having sustained the demurrer, the complainants appealed.

FELCH, J.[51] [The court, after discussing the powers of the corporation, proceeds:] This leads to the second inquiry in the case: Can this suit be maintained?

It was one of the earliest principles established, that courts of justice will not lend their aid in enforcing contracts which are contrary to law. If, in transactions of this character, either party has obtained the advantage of the other, however great may be the hardship of the case, courts will not aid one violator of law against the other, but will leave them as they are found. "Melior est conditio possidentis" is the maxim in such case, both in law and equity.

W. 109, 37 L. R. A. 138, 65 Am. St. Rep. 22 (1897); Zinc-Carbonate Co. v. First National Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845 (1899); Security National Bank v. St. Croix Power Co., 117 Wis. 211, 94 N. W. 74 (1903).

[51] Part of the opinion is omitted.

The rule applies as well when the subject matter of the contract is malum prohibitum, as when it is malum in se. In Aubert v. Maze, 2 Bos. & Pull. 371, the doctrine which applies in cases of malum in se, was applied to a transaction prohibited by statute. In Watts v. Brooks, 3 Ves. Jr. 612, the same doctrine was applied in equity. In Ribbans v. Crickett, 1 Bos. & Pull. 264, under the statute prohibiting the furnishing of provisions to voters, the court refused to enforce a contract by the defendant to pay for such provisions, upon the ground that it was a contract to disobey the law. The same principle runs through all the English cases.

The courts of this country have uniformly adopted the same principle, and refused to assist either party in the enforcement of a contract to violate the law. Mitchell v. Smith, 1 Bin. (Pa.) 110, 2 Am. Dec. 417; s. c. 4 Dall. (Pa.) 269, 1 L. Ed. 828; Maybin v. Coulon, 4 Dall. (Pa.) 298, 1 L. Ed. 841; Duncanson v. McLure, 4 Dall. (Pa.) 308, 1 L. Ed. 845; Nichols v. Ruggles, 3 Day (Conn.) 145, 3 Am. Dec. 262; Pratt v. Adams, 7 Paige (N. Y.) 615; Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468; Hannay v. Eve, 3 Cranch, 242, 2 L. Ed. 427; Patton v. Nicholson, 3 Wheat. 204, 4 L. Ed. 371; Ex'rs of Cambioso v. Assignees of Maffett, 2 Wash. C. C. 98, Fed. Cas. No. 2,330; Bartle v. Nutt, 4 Pet. 184, 7 L. Ed. 825; Craig v. State of Missouri, 4 Pet. 410, 7 L. Ed. 903.

In Hunt v. Knickerbacker, 5 Johns. (N. Y.) 327, the rule is laid down correctly, to be, that all contracts, which have for their object any thing which is repugnant to the general policy of the common law, or contrary to the provisions of any statute, are void, and not to be enforced. This was a contract to sell lottery tickets without authority from the legislature of New York, which was rendered illegal by a law of that state; and the court refused to enforce the contract. "No case, I believe, can be found," says Thompson, J., "where an action has been sustained, which goes in affirmance of an illegal contract." Burt v. Place, 6 Cow. 431. The inquiry as to the character of the act to be done, is, whether it is rendered illegal. It is, I apprehend, of no importance to determine what is the consequence of the violation of the law to the parties,—whether it is visited with punishment as a criminal act, or is attended with civil consequences affecting the pecuniary interests of the parties, or whether they are left to the mercy of each other. When once it is determined that the act contracted to be done is prohibited by law, the court will afford no aid.

There may be a difficulty in cases where contracts are made in reference to matters but remotely tainted with immorality or illegality, and not the immediate subject of the undertaking of parties, to determine in what instances the principle should be applied; but when the very act contracted to be done is itself illegal, there can be no doubt of the application of the principle.

The Bank of Michigan contracted to obtain and convey a title to

real estate, under circumstances which made it a transaction prohibited by the spirit and terms of its charter. The defendant, with knowledge of the unlawfulness of the transaction, (for the charter is declared to be a public act,) entered into the contract. Each party to the contract put himself in the power of the other; and, as a court of equity would not interfere to compel the bank to perform its agreement, by buying and selling lands in violation of the law, so aid cannot be afforded to the bank to compel the defendant to perform on his part. The decree of the Chancellor sustaining the demurrer, must be affirmed.[52]

Decree affirmed.

WHITNEY ARMS CO. v. BARLOW.

(Court of Appeals of New York, 1875. 63 N. Y. 62, 20 Am. Rep. 504.)

The plaintiff is a corporation organized in the state of Connecticut, as declared by its charter, for the purpose of manufacturing every variety of firearms, and other implements of war. This action was brought against the defendants as trustees of the American Seal Lock Company, a corporation organized under the General Manufacturing Act (chapter 40, Laws of 1848), to enforce the statutory liability to pay the debts of said corporation because of an alleged failure to make, publish and file annual reports.

Said corporation was organized in May, 1871. Its capital stock was $300,000, all of which was issued to pay for certain patent rights purchased by the company. No report was made and filed until January 19, 1872, when a report was made, verified and filed containing the following statement:

"The amount of the capital stock of this company, and which has been issued for the purchase of patent rights and which has not been paid in cash, is $300,000; amount of existing debts, $45,393.88."

A report, similar as to the statement of capital stock, was filed January 18, 1873. On the 6th October, 1871, said corporation entered into a contract with plaintiff by which the latter agreed to manufacture and deliver 20,000 railroad locks to be paid for sixty days after delivery. Plaintiff made and delivered 10,000 locks under the contract when, by mutual agreement, the contract was suspended as to the residue. The evidence as to the time of delivery was conflicting and uncertain, but the balance of testimony was to the effect that a few were delivered in December, 1871; the greater portion in January, and a few in February, 1872. Two notes were given by defendant's company for the purchase-price at two months, one dated January 24, 1872, the other January 31, 1872. * * *

[52] Compare Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14 (1884); Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 61 Atl. 167 (1905).

The court directed a verdict for the plaintiff for the amount of the indebtedness, which was rendered accordingly.[53]

ALLEN, J.[54] [After discussing the sufficiency of the reports filed by the defendant company, the court proceeds:] As it is left in doubt whether some portion of the debt did not accrue during the default of 1871, and as other questions may arise, it is necessary to consider the other objections taken by the appellant to the judgment.

It must be conceded that the manufacturing and vending of "rail-road locks" is not within the purposes for which the plaintiff was incorporated, or within the powers conferred by its charter. Neither is such business incidental to the purposes of the incorporation, or in any way necessary to, or as far as appears even an aid in the exercise of the powers conferred upon the plaintiff by its constitution, so that it could be regarded as among the implied powers granted by the Legislature and assumed by the corporators.

Did the question now made arise upon an application by the stockholders and corporators to restrain the corporate agents from applying the corporate funds to purposes foreign to the corporation, or engaging in business outside of that for which the company was formed, or on proceedings by the sovereign power to annul the charter for an abuse of the powers granted, or in a proceeding to enforce and for the performance of an executory contract, where, upon a rescission or annulling the agreement, both parties would have the same position as if no contract had been made, the rules of decision would be different from those which must prevail in the present action. In either of the cases suggested it is very likely the courts would be compelled to give full effect to the objection and hold the business unauthorized and a violation of the charter, and a forfeiture of the chartered rights and the contract null, and refuse to perform it or give effect to it. The manufacture of the locks, or contract to sell them to the Seal-Lock Company, were not acts immoral in themselves or forbidden by any statute, neither mala in sese or mala prohibita, so as to make the contract illegal and incapable of being the foundation of an action; such a contract as the law will not recognize or enforce, but applying the maxim, ex facto illicito non oritur actio, leave the parties as it finds them.

When acts of corporations are spoken of as ultra vires, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created. Earl of Shrewsbury v. North Staffordshire R. Co., L. R., 1 Eq. 593;

[53] Statement of facts abridged. [54] A part of the opinion is omitted.

Tayler v. Chichester & Midhurst R. Co., L. R. 2 Exch. 356; Bissell v. Mich. C. R. Co., 22 N. Y. 258.

Whether the contract as originally made was ultra vires is not a very important inquiry at this time. If it was, the State under whose sovereignty it dwells and by whose act and favor it exists, has no interest in arresting its action for the recovery of moneys equitably due upon a contract fully executed and a work fully accomplished, whatever may be its right to annul its charter. The shareholders whose confidence has been abused and whose funds have been diverted from their proper use, have a direct interest in reclaiming and restoring to proper custody and applying to legitimate uses the funds which have been diverted and improperly used for purposes dehors the legitimate business of the corporation. The plea of ultra vires should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong.

Here as between two corporations, the debtor and creditor corporation, the contract has been fully performed by the creditor, the plaintiff in this action, and the Seal-Lock Company has received the full consideration of its promise to pay. The plaintiff has parted with its property to the latter corporation, and unless a legal liability exists on the part of the latter to pay, the plaintiff can neither reclaim the property nor recover compensation, and under this technical plea a great wrong will be perpetrated. A purchaser who acquired by contract, and under an agreement to pay for it the property of a corporation cannot defeat the claim for the purchase-price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money either in services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was ultra vires, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail in an action by the corporation.

It is now very well settled that a corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds e converso. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation. Ex parte Chippendale, 4 De G., M. & G. 19; In re National P. B. Build. Soc., L. R. 5 Ch. App. 309; In re Cork, etc., R. Co., L. R. 4 Ch. App. 748; Fishmongers' Co. v. Robertson, 5 McG. 131.

The only justification for such a plea by an individual sued upon a contract with a corporation is that the obligation is not mutual, as the other party, the corporation, would not be bound by it. The objection to such a defense in an action upon an executed contract is given by Tindal, Ch. J., in the case last cited, in these words: "Upon the general ground of reason and justice, no such answer can be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promises; such promise by them is therefore not nudum pactum; they never can want to sue the corporation upon the contract in order to enforce the performance of their stipulations which have been already voluntarily performed, and therefore no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them on the ground of inability of the corporation, which suit they can never want to sustain." * * *

In Jones v. Barlow, 62 N. Y. 202, we held that the liability of a trustee, upon the failure of the corporation to make the annual report called for by the statute, was co-extensive and concurrent with that of the corporation, quoad the debt which was sought to be fixed upon him. That there must be not only an existing debt against the corporation but a debt presently due, and for the recovery of which an action would lie against the corporation; and that if the corporation was not suable by reason of a novation or renewal of the debt, an action would not lie against the trustee. We gave the defendant the benefit of that rule. Applying the same principles here, and for the reasons assigned in the prevailing opinion there given, we are constrained to hold, that if a valid debt exists against the corporation, to which there is no good defense in law or equity in behalf of the corporation, it must be adjudged and held a valid debt where the trustee is sought to be charged with its payment. This necessarily follows as the converse of the decision in Jones v. Barlow, 62 N. Y. 202. The first step is taken in establishing the liability of the trustees where the facts proved would entitle the plaintiff to a judgment against the corporation for the debt in suit. That establishes the existence of a debt against the corporation; and upon proof of the other facts, viz.: the trusteeship and default in making the report, the liability of the trustee is proven and judgment must go against him. Other questions may arise in respect to the report of 1873, and we do not pass upon that.

The judgment must be reversed and a new trial granted, costs to abide event. All concur.

Judgment reversed.[55]

[55] Accord: Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664 (1896); Camden & Atlantic R. R. Co. v. Mays Landing, etc., Co.,

MARBLE CO. v. HARVEY.

(Supreme Court of Tennessee, 1892. 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71.)

LURTON, J.[56] The complainant is an Ohio corporation, and was organized, under the general incorporation law of that state, "for the purpose of cutting, dressing, manufacturing, selling, and disposing of marble, stone, slate, granite, and other substances, with such other incidental and necessary powers essential to carrying on said business." This company, with its place of business in Cincinnati, Ohio, has acquired the entire issues of shares made by a Tennessee corporation engaged in a similar business, and under a similar charter, and known as the McMillin Marble Company. Its last acquisition of shares was under a contract with the defendant, who was president of the Tennessee company, and who owned at the time of the sale 25 shares, being one half of the entire stock of the company. These shares he conveyed to a trustee selected by the purchasing corporation, for its use and benefit. The consideration for the sale was the payment of $6,000, the defendant assuming and agreeing to personally pay off and discharge one half of all liability which might be fixed upon the McMillin Marble Company as a result of certain suits against that company then pending in the courts of this state.

The bill alleges, and the evidence establishes, that the complainant company has been compelled, in order to protect the property of the McMillin Marble Company, to pay out about the sum of $3,000 in the settlement and satisfaction of the claims in suit at time of its contract with defendant.

The relief sought is a decree against defendant for one half this sum, being the proportion he agreed to pay under the agreement of sale.

The defense is that the contract of sale to the complainant company was unlawful and void,—that is to say, that the purchase of

48 N. J. Law 530, 7 Atl. 523 (1886); Seymour v. Chicago Guaranty Fund Life Society, 54 Minn. 147, 55 N. W. 907 (1893).

In Denver Fire Insurance Co. v. McClelland, 9 Colo. 11, 22, 9 Pac. 771, 776, 59 Am. Rep. 134 (1885), the court in sustaining a recovery on an ultra vires insurance policy said: "We are aware that the courts have been very slow to concede that a defendant setting up as a defense the ultra vires of a contract, where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts could avoid this seeming inconsistency by resting the recovery upon some other ground they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show the invalidity of the contract. In such case, the contract is assumed by the court to be valid, the party seeking to avoid it not being permitted to attack its character in this respect."

[56] A part of the opinion is omitted.

these shares was outside the objects of its creation, as defined in its charter, and is therefore such a contract as is not only voidable, but wholly void, and of no legal effect; that it is not a case of excessive use of a power granted, but that no power whatever was conferred to deal in or hold the shares of another corporation; that the suit is one upon a void contract, and in furtherance of it, and that it should not be entertained by a court of law or equity.

"The rule in the United States" says Mr. Green, the American editor of Brice's Ultra Vires, "is that a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter or necessarily implied in it." Green's Brice's Ultra Vires, 91, note b, and American cases cited.

"A corporation has no implied right to purchase shares in another company for the purpose of controlling its management, nor may a corporation hold shares in another company as an investment, unless this be the usual method of carrying on its proper business. A corporation must carry on its business by its own agents, and not through the agency of another corporation. It is clear, also, that a corporation has no implied right to speculate in shares, unless this be the kind of business for which the company was formed." 1 Mor. Priv. Corp. § 431.

The evidence shows that the declared purpose of complainant in buying in the shares held by the defendant was to enable it to manage and control the business of the Tennessee company in the interest of the Ohio company. There is no pretense that it had any express power to purchase shares in another company, and it is too clear to need argument or further citation of authority that it had no implied authority to purchase and hold shares, either in its own name or in that of a trustee, for the purpose of controlling another corporation. That these corporations were engaged in a similar business does not help the case. The purpose and intent in granting a charter is that the corporation shall carry on its business through its own agents, and not through the agency of another corporation. The public policy of this state will not permit the control of one corporation by another. Especially is this true when a foreign corporation thus undertakes to control and swallow up a domestic company. Such control of one corporation by another in a like business is unlawful, as tending to monopoly.

The result is that this purchase of shares for the express object of controlling and managing another corporation was ultra vires, and therefore unlawful and void. Being void, it was of no legal effect, and no rights result from it, enforceable by or through the courts of this state, when such aid is invoked in furtherance of the unlawful agreement.

But it has been insisted very earnestly by the able and learned counsel for complainant that, when the contract has been fully executed by the plaintiff, the defendant should not be permitted to

invoke such defense to a suit brought to compel performance; that to permit such a defense would work injustice, and enable defendant to repudiate his liability while holding on to the price he has received. There are cases where, the contract being fully executed on both sides, the court, in the interest of justice, has refused to aid either in obtaining a rescission. Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, is one of this class. So there are cases where the defense of ultra vires has not been entertained when the defect was in the *mode* of executing the contract or in the *power of the agent.*

So there are many cases holding the party relying upon the defense of ultra vires to an accountability for the benefits received. Green's Brice's Ultra Vires, 717, and the note at end of chapter.

Again, there are cases where the courts have refused to entertain suits to recover property from corporations which is held in excess of charter capacity. In such cases the courts have held that the defect in the power could not be set up in a collateral way, and that the state only could complain of such violation. To this effect were our own cases of Barrow v. Turnpike Co., 9 Humph. 304, and Heiskell v. Lodge, 87 Tenn. 668, 11 S. W. 825, 4 L. R. A. 699.

The question here is not like any of these. The complainant sues upon its contract, and in affirmance of it seeks to have the defendant perform an agreement which sprang from and was collateral to it. It has received the shares it purchased, and holds on to them. It simply asks that the defendant be further compelled to perform its contract, by contributing, in accordance with his agreement, his proportion of the liability paid off by complainant in protection of the property of the McMillin Marble Company. The suit is clearly in furtherance of the original unlawful and void contract. That the contract has been executed by the plaintiff does not make it lawful, or entitle it to an enforcement of it.

This proposition was very plainly put in Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., where it was stated, as a result of all the previous discussions of that court upon the subject, that "a contract made by a corporation, which is unlawful and void, because beyond the scope of its corporate powers, does not, by being carried into effect, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a quantum meruit, the value of what the defendant has actually received." 131 U. S. 389, 9 Sup. Ct. Rep. 770, 33 L. Ed. 157. * * *

To sustain the suit as now presented would be in affirmance and furtherance of an unlawful and void contract. It is in no sense a suit in disaffirmance.

Whether complainant could tender back the shares received, and maintain a suit to recover the money paid for the shares upon an

implied agreement to return money which the defendant had no right to retain, is a question not presented upon this record.

The decree dismissing the bill must, upon the grounds herein stated, be, and accordingly is, affirmed.[57]

III. Executed Contracts and Ultra Vires Leases

BLACKBURN & DISTRICT BEN. BLDG. SOCIETY v. CUNLIFFE, BROOKS & CO.

(Supreme Court of Judicature, 1885. L. R. 29 Ch. Div. 902.)

Cotton, L. J., now delivered the following judgment of the Court (Brett, M. R., and Cotton and Lindley, L. JJ.):[58]

This is an action brought by the official liquidators of the Blackburn & District Benefit Building Society against the bankers of the society. In form the action is for an account, but in substance it is to recover from the bankers moneys from time to time paid to them by the society and applied by them towards discharging the balance alleged by the bankers to be due to them from the society upon their banking account, which was considerably overdrawn.

The society is a benefit building society established in 1868 under the Act 6 & 7 Will. IV, c. 32. It was never incorporated under the Building Societies Act, 1874. On the 23rd of July, 1881, a petition was presented for winding up the society, and on the 25th of October, 1881, it was ordered to be wound up.

The rules of the society were certified on the 7th of May, 1868, and those rules did not authorize the directors to borrow money on behalf of the society.

In 1874 the directors of the society, in accordance with one of the rules (47) opened a banking account in the names of the trustees of the society with the defendants. The account was headed "The Trustees of the Blackburn and District Building Society, Broadbent and Hutchinson, secretaries, in account current with Messrs. Cunliffe, Brooks, & Co., Old Bank, Blackburn."

Into this account the moneys of the society were paid from time to time as received, and on the other hand cheques were drawn upon

[57] Accord: East Anglian Ry.'s Co. v. Eastern Counties Ry. Co., 11 C. B. 775 (1851); Oregon R. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837 (1889); McCormick v. Market Nat. Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817 (1897); California Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198 (1896).

Compare Kadish v. G. C. E. L. & B. Ass'n, 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256 (1894); National Home Bldg. Ass'n v. Home Savings Bank, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 390, 72 Am. St. Rep. 245 (1899).

[58] Facts sufficiently stated in the opinion, a part of which is omitted.

it for the purposes of the society, or for what the directors considered to be such purposes. The account was sometimes overdrawn and sometimes in credit. From the 6th of March, 1875, to the 3rd of May, 1878, it was largely overdrawn. On the last mentioned day it was in credit; but after that day until the winding-up of the society the account was always overdrawn. The overdraft often amounted to more than £10,000, but at the commencement of the winding-up the account was only overdrawn to the extent of about £2,700, the balance against the society having been reduced to this amount by payments made from time to time to the credit of the account.

The mortgage and other securities of the society appear to have been kept from the first at its bankers for safe custody; but on the 27th of September, 1876, the directors signed a memorandum giving the bankers a lien upon all the society's deeds and documents to secure all moneys which from time to time might be owing by the society to the bankers on the balance of the banking account. Annual balance-sheets shewing the amounts due to the bankers were sent to all the members of the society.

In November, 1881, the liquidators of the society brought an action against the bankers to recover the securities held by them, and the Vice-Chancellor of the county palatine gave judgment in the plaintiffs' favour, and ordered the bankers to deliver up the securities they held. From this judgment the bankers appealed. The Court of Appeal agreed with the Vice-Chancellor in thinking that the directors of the society had no power to borrow money on the credit of the society, or to give any security on the property of the society for money borrowed; but the Court of Appeal held that the bankers were entitled to a lien on the securities they held for such of their advances (but for such only), as had been applied in payment of the debts and liabilities of the society properly payable, and the Court of Appeal accordingly reversed the order of the Vice-Chancellor, and remitted the case back to him with various declarations and inquiries based upon the above principle: see 22 Ch. Div. 61. From this decision the bankers appealed to the House of Lords, but their appeal was unsuccessful: see 9 App. Cas. 857.

This litigation decided, in addition to the question already mentioned, that the bankers were not entitled to a lien for moneys paid by the society to members who had withdrawn from the society, nor to the benefit of moneys advanced by the society to borrowing members on the ground that nothing ought to have been either paid to withdrawing members or advanced to borrowing members out of borrowed capital.

In directing the accounts and inquiries to give effect to the lien of the bankers to the limited extent to which it was upheld, the Court, amongst other things, declared that the bankers were to be charged with all sums received by them on account of the society since the time when the society last ceased to have any balance stand-

ing to its credit on its account with the bankers, and that the bankers were not to be allowed any sums advanced by them to the order or on account of the society since the same time and applied by the society otherwise than in paying debts and liabilities of the society properly payable.

The object of the present action is to go still further than before, and to compel the bankers to refund all moneys of the society applied by the bankers in discharge of their loan to the society. For this purpose the liquidators of the society claim an account of all moneys received and paid by the bankers for the society, with a declaration that in taking the account the bankers are to be charged with all sums received by them on account of the society since the date when they were appointed bankers thereof, and that they are not to be allowed any sums paid by way of overdraft, or otherwise by way of loan, which have been applied otherwise than in payment of the legitimate debts and liabilities of the society.

The action came on to be heard before the Vice-Chancellor of the county palatine, and his decision was in favor of the liquidators and against the bankers, and from his decision the bankers have appealed.

It was urged on behalf of the appeal that the moneys sought to be recovered were applied by order of the directors in repayment of the moneys borrowed under a mistake of law as to their power to borrow, and that no one can recover money so paid voluntarily, or money paid on an illegal contract. This is correct where the same person who made the payment, or was party to the contract, seeks to recover the money. But here the liquidators are suing on behalf of the society, and complain that the directors, both in borrowing and in directing the application of the moneys of the society, acted in excess of the authority given to them; and that their acts do not bind the society, and that the bankers knew that the directors had no authority so to deal with the moneys of the society. This, in our opinion, is correct, and consequently the acts of the directors were unauthorized, and are not to be considered as acts of the society, and this objection cannot be maintained.

It was also urged by the appellants that the society was not a corporation, that all the individuals who made up the society, by seeing the accounts circulated, knew that the directors had borrowed money, and were applying the funds of the society in repaying the money so borrowed, and that they must be taken to have ratified the acts of the directors. But these acts were not within the scope and objects of the society, so that no majority could even in general meeting bind the minority present, or any absent member, and in our opinion it would be wrong to hold that all members of the society, from merely receiving the accounts, knew that the directors had borrowed money from their bankers, and had authorized repayment out of the funds of the society. For although this was a conclusion

which would probably be drawn from a careful examination and comparison of the accounts, it would, in our opinion, be wrong to draw the conclusion that all members in fact understood that this was the effect of the accounts, or even that they examined or read the accounts. Even if they did, there was no ratification. For although nothing was done to question the accounts, no other ratification was alleged, and mere omission to question the accounts or acts of the directors cannot properly be treated as ratification. The loans and repayment were not stated as matters to be ratified, they were represented as, and considered to be, acts within the power of the directors, and there was no intention to ratify. In our opinion, therefore, it cannot be maintained that all the members of the society had ratified the application of the money sought to be recovered.

Possibly the bankers may be able to prove that some of the members not only knew of but intended to adopt and ratify the dealings of the directors. This judgment in no way deals with and will not prejudice such claim, if any, as the bankers may be advised to make in respect of any moneys payable to such of the members, or representatives of deceased members, as concurred in the dealings of the directors with the moneys of the company. This is not a question for decision in the present action.

On the main question the appellants, in our opinion, fail. * * *

PRESIDENT & VISITORS OF MARYLAND HOSPITAL v. FOREMAN.

(Court of Appeals of Maryland, 1868. 29 Md. 524.)

On the 17th of April, 1863, Foreman paid to the Maryland Hospital through its superintendent $1,200 in consideration of the undertaking of the latter to support Foreman's sister in the hospital during life. Miss Foreman died on the 12th of August, 1864. Foreman claimed that after deducting the expense of support during this interval the balance of the $1,200 was rightfully payable to him, and the present action was instituted to recover the same.[59]

BARTOL, C. J.[60] This suit was instituted by the appellee to recover money paid by him upon a contract alleged to be illegal and void. At the first argument, heard near the close of the last term, the validity of the contract, evidenced by the receipt dated the 17th of April, 1863, was assailed chiefly on the ground that it was condemned by public policy, and was, therefore, illegal and void. The contract having been executed, and there being no evidence whatever of any duress, hardship or oppression practised upon the party complaining, there seemed to be great force in the objection that the

[59] Statement of facts substituted. [60] A part of the opinion is omitted.

plaintiff came too late to have the contract set aside, and that the principle, in pari delicto, ought to be applied. * * *

The contract upon which the money was paid by the appellee having been made by a corporation, the question lying at the basis of the whole case is, whether the corporation possessed the power to make such a contract. This depends upon the true construction of the 44th article of the Code by which its powers are conferred and defined. The only sections bearing upon the question before us are the 7th and 9th. The 7th section provides that the President and Visitors "may make, ordain, alter, amend and abolish all by-laws, rules and regulations for the administration and government of the hospital as they may deem beneficial and advantageous." The 9th section provides that "they, or any number of them, not less than seven, shall have power to prescribe such rules and regulations as they may deem necessary for the management, government and regulation of said hospital, and for the admission and discharge of persons therein or therefrom, which rules and regulations shall be binding on all persons whatsoever." In our opinion, these sections cannot be properly construed to confer on the appellants the power to make the contract in question. They obviously refer first to the internal policy and management of the hospital, and confer power to make rules for its regulation and government; and, secondly, to make rules for the reception and discharge of patients, and as incidental thereto, the power to fix the terms or rate of compensation to be paid for the nursing, attendance and care of patients. The contract before us was not made under, or in conformity with, any such rule or regulation. It was in the nature of a life insurance, or a lottery, or wager contract, depending upon the duration of the life of the patient, without regard to the duration of her unfortunate malady, and made the loss or profit of the appellants depend upon the life or death of the patient. The power to prescribe rules fixing the rate of compensation for the care of insane patients, cannot, we think, be construed into a power to make a speculative contract of that kind.

No principle is better established than that which limits corporations to the exercise of such powers only as are expressly granted by law, and such as are necessary and usual in the course of their business, to enable them to attain the purposes of their creation. No express power to make the contract before us was conferred upon the appellants, nor was it either usual or necessary in the course of their business. The proof shows that it was unusual; no such contract had ever before been made by them, and, in order to fix upon its terms, they found it necessary to resort to the tables of life insurance companies, compiled from calculations of the probable duration of human life. The power to enter into contracts of that nature cannot be inferred from the terms of the charter.

The President and Visitors of the Maryland Hospital are a corporation established for the purpose of receiving insane patients, an

unfortunate class of persons most helpless and dependent upon the care and protection of those who have them in charge. The object of the law in establishing the institution was to provide for its inmates such attention and treatment as will secure their comfort and promote their cure. It was not designed that the appellants should speculate upon the life or death of the patient, or enter into a contract by which it might become the interest of the corporation to shorten the life or protract the cure of the patient. It seems to us that it would be contrary to public policy to confer such a power, and, in the absence of express legislative grant, its existence will not be inferred. In the opinion of this Court, the appellants had not the power, under their charter, to enter into the contract of the 17th of April, 1863; it was made ultra vires; was not binding upon them, and could not have been enforced in favor of the appellee. Is he entitled to recover back the money paid under it, or does the principle in pari delicto apply?

If a contract be illegal in itself, or is in violation of some statute or against public morals, Courts of justice will not aid to enforce it, for the Court will not contribute the means of infringing the law. Merrick v. Trustees, etc., 8 Gill, 72; Bayne v. Suit, 1 Md. 86. Such a contract, while it remains executory, may, in some cases, be disaffirmed by either party, and the money paid upon it recovered back. But, after it has been executed, if it appear that the parties stand strictly in pari delicto, it is too late for either to disaffirm or rescind it, and the parties are left without remedy against each other. 1 Story's Eq. Jur. § 298; 2 Parsons on Contracts, 252, 253; Sedwick v. Sedwick, 6 Gill, 39.

These principles are well settled, and apply where the contract is in violation of some positive law, or involves moral turpitude; the contract made between the appellants and the appellee is not one of that kind; it was neither malum in se nor malum prohibitum; the parties, therefore, cannot be said to be in pari delicto, for, in the proper sense of the word, there is no delictum. Here the objection, which is fatal to the validity of the contract, is, that the power to make it was not conferred upon the corporation by its charter, either expressly or by implication. It was simply ultra vires, and, therefore, not binding upon the parties.

To such a contract the principle in pari delicto does not apply; but if the party dealing with the corporation has paid money upon it, he is entitled to recover it back. This point was very fully considered and discussed by the Supreme Court of New York in Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132, and in Curtis et al. v. Leavitt, 15 N. Y. 9.

In the able and elaborate opinions of Judges Selden and Comstock in the former, and in the latter of Comstock, Selden and Paige, Justices, many authorities are collected and reviewed, and the doctrine is asserted, that if a party makes a contract with a corporation,

which is simply beyond the powers of the latter, he may recover back the money paid thereon, whether the contract be executed or executory. "The contract in all such cases will be regarded as void, and the party who delivered the property or advanced the money to such corporation will be entitled to his legal remedy, not founded upon, but in repudiation of the contract to recover the property or the money from the corporation, upon the principle that it had acquired no right or title to either under the contract" 15 N. Y. 239.

We consider this rule as consonant with reason and sound public policy, and supported by the weight of adjudged cases. This will abundantly appear by reference to the authorities cited in the opinions of the Judges, in Tracy v. Talmage and Curtis v. Leavitt, before referred to. We are therefore, of opinion that, upon the finding by the jury of the facts stated in the prayer of the plaintiff below, he was entitled to their verdict. By that prayer, the jury were instructed that the plaintiff was entitled to recover the sum of $1,200 which had been paid by him under the contract, "less the amount properly chargeable as a fair and reasonable allowance to the defendants for the care and keeping of the lunatic during the period which intervened between the 30th of June, 1863, and the 12th of August, 1864, the date of the lunatic's death." This being, in its nature, an equitable action, the measure of the plaintiff's recovery must be determined upon equitable principles, the deduction or abatement was therefore, properly allowed.

Finding no error in the ruling of the Superior Court upon the prayers, the judgment must be affirmed.

Judgment affirmed.

LONG v. GEORGIA PAC. RY. CO.

(Supreme Court of Alabama, 1890. 91 Ala. 519, 8 South. 706, 24 Am. St. Rep. 931.)

McCLELLAN, J.[61] The case made by the amended bill is this: On April 23, 1883, the complainant, B. M. Long, and his wife, Amanda C. Long, executed to the Georgia Pacific Railway Company a deed, upon valuable consideration presently paid, to and of the iron, coal, and oil interests and properties in and pertaining to certain tracts of land, aggregating about 4,000 acres, the said Long retaining the fee to said lands, except in respect to said mineral interests, and continuing in possession thereof. The grantee is a corporation, and was and is without power to purchase and hold said land, or the mineral interests in the same. The bill seeks to have the deed declared void because of this incapacity of the corporation, and to have the same canceled as a cloud upon complainant's title. The bill was demurred

[61] Statement of facts omitted.

to on several grounds, and the demurrer was sustained generally, the decree to that end being now assigned as error.

Only those grounds of error which present the question, whether a vendor who has sold, received payment for, and conveyed land to a corporation, which had no power to hold the same, can have any relief in respect to the transaction, are discussed in argument, and to these our consideration will be confined; since it is manifest that the determination of this question in line with the decree below, as we think it must be determined, will be fatal, not only to the present appeal, but to complainant's cause of action.

It is thoroughly well-settled law that a party to an ultra vires executory contract, made with a corporation, is not estopped to set up the want of corporate capacity in the premises either by the fact of contracting, whereby the power to contract is in a sense admitted or recognized, or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction comes from the corporation itself. Bank v. Dunkin, 54 Ala. 471; Chambers v. Falkner, 65 Ala. 448; Sherwood v. Alvis, 83 Ala. 115, 3 South. 307, 3 Am. St. Rep. 695; Lime Works v. Dismukes, 87 Ala. 344, 6 South. 122, 5 L. R. A. 100.

But where the contract is fully executed, where whatever was contracted to be done on either hand has been done, a different rule prevails. In such case the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other. As declared by Mr. Bishop, "the parties' voluntary doing of what they had unlawfully agreed places them, in effect, in the same position as if the contract had been originally good; neither can recover of the other what was parted with; the reason for which is that, since they are equally in fault, the law will help neither." Bish. Cont. § 627.

The former decisions of this court are in line with this doctrine, and fully recognize the distinction between executory and executed void contracts, to the effect that, while suits to enforce the former may always be defended on the ground of their invalidity, no relief prayed upon such ground can be granted with respect to the latter. Morris v. Hall, 41 Ala. 510; Ingersoll v. Campbell, 46 Ala. 282; Sherwood v. Alvis, 83 Ala. 115, 3 South. 307, 3 Am. St. Rep. 695; Dudley v. Collier, 87 Ala. 431, 6 South. 304, 13 Am. St. Rep. 55; Craddock v. Mortgage Co., 88 Ala. 281, 7 South. 196. And this is the doctrine generally declared by other courts. Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950; Day v. Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; Parish v. Wheeler, 22 N. Y. 494; Ditch Co. v. Zellerbach, 37 Cal. 543, 606, 99 Am. Dec. 30; Terry v. Lock Co., 47 Conn. 141.

There is no question but that the case presented by the bill involved a contract on the part of the railway company to buy, and

on the part of the complainant to sell, certain interests in the land described. It is equally clear that the payment of the agreed price on the one hand, and the execution of the conveyance on the other, fully executed this contract on both sides, left nothing to be done by either party in the premises, and brings the transaction within the principle we have been considering, which denies to complainant any relief in respect to it.

The same conclusion is reached by another well-established principle. It is that when a party sells and conveys property to a corporation, which is without power to purchase and hold the same, and receives compensation therefor, there being no fraud in the transaction, he is in no sense injured or prejudiced by the incapacity of the corporation, nor can he be heard to complain of it; but the question becomes one between the corporation and the state, the sovereign alone having the right to impeach the transaction; and, until it supervenes for this purpose, the corporation is vested with perfect title against all the world, defeasible only on office found. Railroad Co. v. Proctor, 29 Vt. 93; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; Goundie v. Water Co., 7 Pa. 233; Baird v. Bank, 11 Serg. & R. (Pa.) 411; Lathrop v. Bank, 8 Dana (Ky.) 114, 129, 33 Am. Dec. 481; Hough v. Land Co., 73 Ill. 23, 24 Am. Rep. 230; Cowell v. Springs Co., 100 U. S. 55, 25 L. Ed. 547; Reynolds v. Bank, 112 U. S. 405, 413, 5 Sup. Ct. 213, 28 L. Ed. 733; 2 Mor. Priv. Corp. § 710.

The decree of the chancellor is affirmed, and the same result is reached in the case of B. L. Jones and B. B. Long v. Georgia Pacific Railway Company, submitted with this case, and involving the same question. Affirmed.

BOYD v. AMERICAN CARBON BLACK CO.

(Supreme Court of Pennsylvania, 1897. 182 Pa. 206, 37 Atl. 937.)

Bill in equity by one Boyd against the American Carbon Black Company, praying for the dissolution of a partnership existing between the parties, the appointment of a receiver and an accounting.

The agreements in question were made in 1891, and 1893, for the manufacture of carbon gas black. Boyd had a one-fifth interest under the first contract, and a one-half interest under the second. The Carbon Black Company has entered into a combination with the Columbian Black Company and refuses to carry out the partnership agreement with Boyd.

Boyd is a stockholder and director in the American Carbon Black Company. The trial court sustained a demurrer to the bill; appeal.[62]

[62] Statement of facts substituted.

DEAN, J.[68] * * * Of course, the demurrer admits the truth of the averments in plaintiff's bill. We have, then, the facts that the contracts of partnership were made by the plaintiff with the corporation of which he was a stockholder and director, and a gross violation by defendants not only of the contract of partnership, but of the contracts made with him for the purchase of gas from his premises by the partnership. The principal reason given by the learned judge of the court below for sustaining the demurrer is that the contract of partnership by the corporation was ultra vires; that no corporation has authority to share its corporate management with natural persons, in a partnership. And for this, ample authority is cited, and the rule cannot be questioned.

But, conceding, the full force of this rule, does it deprive the plaintiff, on the facts, of all remedy in equity? Assume that the partnership has not now, and never had, a legal existence. That is only because one of the partners had no power to enter into it. But, while it had no legal existence, it had one in fact, and the other partner fully performed. The corporation had the full benefit of the contract up to the time it concluded that it was more profitable to violate its agreements. 2 Beach, Priv. Corp. § 842, says: "It may be considered prima facie ultra vires for an incorporated company to enter into a partnership with other persons." But all the authorities hold that, notwithstanding the prima facie, if it be shown that the other partner had fully performed his obligations under the contract this plea will not avail. "A corporation may not avail itself of the defense, ultra vires, when the contract has been in good faith fully performed by the other party, and it has had the full benefit of the performance and of the contract." 27 Am. & Eng. Enc. Law, p. 363; Mor. Corp. § 688; Wright v. Pipe-Line Co., 101 Pa. 204, 47 Am. Rep. 701; Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co., 83 Pa. 160.

Taking, as we must, every material averment of plaintiff's bill as an admitted fact, the defense, if it should prevail, would work a palpable injustice. While public policy demands that the courts should declare such contracts by corporations unlawful, and that they will make no decree which prolongs their life in fact for a single day, every principle of equity commands that the corporation receiving a benefit from such contract shall account for what it has received from him who has fully performed. The contract is not malum in se, but only malum prohibitum. It was illegal, but not iniquitous. If the corporation has had the benefit of $15,000 paid by Boyd for the construction of the second plant, has received the proceeds of the manufactured product, has used and continues to use his gas, it ought to and must account. It is wholly immaterial whether the partnership be declared dissolved because it is illegal to carry it on,

[68] A part of the opinion is omitted.

or it be declared at an end in fact because of want of power on part of the corporation to enter it; in either case the plaintiff is entitled to his property in possession of defendants, and whatever money they have received more than their share. As they allege that the contracts with plaintiff were illegal, they can claim no rights of possession of the whole partnership assets, and plaintiff's property under them, and must deliver them up to be canceled.

As to the agreement with the Columbian Company, the court below properly held that, as that company was not a party to this suit, no decree affecting it could be made. In so far as the American Carbon-Black Company has made contracts with other parties injurious to its stockholders, such contracts are not involved in this issue. Plaintiff's plea here is as an individual member of an alleged partnership, and our decree is on that issue alone. While the fact that he was a stockholder and director in the corporation confers no authority on the corporation to defraud him in partnership transactions with itself, neither does that fact confer on him authority in this issue to assert his rights as a stockholder.

It is possible, in the averments in the bill, plaintiff might have sustained an action at law, but, at best, that form of remedy would have been cumbersome and inconvenient, and therefore would not have been adequate. Brush Electric Co.'s Appeal, 114 Pa. 574, 7 Atl. 794. It is therefore directed that the decree of the court below, sustaining the demurrer and dismissing the bill, be reversed, and that plaintiff's bill be reinstated and taken pro confesso. Further, that the partnership which was in fact entered into and carried on between plaintiff and defendants under the three several agreements marked Exhibits A, B, and C be declared at an end, and that said contracts be surrendered by defendants for cancellation; that an account be taken of all the rents, royalties, income, and profits due plaintiff from said defendants, according to said contracts; that all the business of said partnership in fact be wound up, and all the assets of the same be turned into cash, and an account be then stated between the parties, and distribution of the cash be made as in and by the said contracts the parties have a right to demand; and that proper decrees for enforcing payment according to said distribution be made on the parties by the court below.

It is further directed that under the equity rules a receiver be appointed by the court below to take into his possession the, in fact, partnership property, books and accounts, to the end that a settlement may be had of its business, and that such further and other decree or decrees be entered by the court below as will promote equity between the parties, in accordance with this opinion. It is further ordered that appellees pay the costs of this appeal.[64]

[64] Accord: Wallerstein v. Ervin et al., 112 Fed. 124, 50 C. C. A. 129 (1901).

MALLORY v. HANAUR OIL-WORKS.

(Supreme Court of Tennessee, 1888. 86 Tenn. 598, 8 S. W. 396.)

Action of unlawful detainer brought by the Hanaur Oil-Works against the defendants to recover possession of property surrendered to the defendants under a combination or partnership agreement.[65]

LURTON, J.[66] This is an action of unlawful detainer, brought by the Hanaur Oil-Works, a corporation created under the general incorporation act of 1875, and engaged in the manufacture of cotton-seed oil at Memphis, Tenn.

The facts which raise the question to be determined are these: In July, 1884, a contract was entered into by and between four corporations engaged in manufacturing cotton-seed oil at Memphis, for the formation of what is designated in the agreement as a "combination," "syndicate," and partnership. The contracting mills agreed to select a committee, composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each mill, to be managed and operated by this committee, through officers, agents, and employés selected by them, for the common benefit; the profits and losses of such operations to be shared in proportions agreed upon. This arrangement was to last one year, but, with consent of all, might be renewed for two additional years; and, as appears, was at end of first year renewed for two other years, terminating August 1, 1887.

The facts clearly establish that the possession of the several mills was turned over to this executive committee, and they were operated by these managers thenceforward under the name of the "Independent Cotton-Seed Association." There was a provision in the contract by which other mills were to be admitted by consent, and a fifth corporation was in fact subsequently admitted. The Hanaur Oil-Works was one of these contracting corporations; the contract being authorized by both shareholders and directors. In July, 1886, the business of the second year having been about concluded, the board of directors of the Hanaur Oil-Works passed a resolution declaring this contract void, as being an agreement ultra vires, and their president was instructed to take possession of their mill. There is some proof tending to show that, upon demand of the president of the defendant in error, the general superintendent of the "Independent Cotton-Seed Association" surrendered possession of the Hanaur mill to him, and agreed to hold for him, and that he afterward repudiated this agreement, by surrendering possession to Mr. Mallory, one of the executive committee, who thereupon locked up

[65] For a full statement of facts, see Mallory v. Hanaur Oil-Works, p. 260.

[66] A part of the opinion is omitted.

the mill, and gave instructions to a watchman, in the employ of the committee, not to admit the Hanaur officers.

[The Court, after holding the agreement is a partnership and ultra vires, proceeds:]

It is next argued that if the contract be ultra vires, that it is an executed contract, and that the courts will not in such case interfere. This contract had yet a little over one year to run. The possession of the Hanaur mills had been obtained under it, and was withheld under a claim of right by reason of the supposed validity of the partnership.

As to the unexpired time, during which the defendants in error might be deprived of the use of their property, and subjected to the hazards of another year's operations, it was not an executed contract. The possession obtained under this contract was illegal, and it was the duty of the officers of the Hanaur company to renounce the arrangement and recover possession. There are cases where, an invalid contract being fully executed, the courts will not entertain a suit to recover money or property transferred under such agreement, or, if they do interfere, will do so only upon equitable terms. But the defense here made would result, if successful, in enforcing the performance of the unexecuted part of a void contract. It is not a case of contract fully executed. The part remaining to be executed is a material part, and is beyond the power of defendant in error to make or sanction. Having entered into it, it was its duty to rescind or abandon it.

In a case where a lease had been made by a railway company for a term of twenty years of its road and franchises, and which, after a lapse of five years, it rescinded, and was thereupon sued for damages under a clause in the lease which authorized rescission, and provided for compensation for unexpired term, the supreme court of the United States said: "It is not a case of a contract fully executed. The very nature of the suit is to recover damages for non-performance. As to this it is not an executed contract. Not only so, but it is a contract forbidden by public policy, and beyond the power of defendant to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause which gave them the right to do it. Though they delayed its performance several years, it was nevertheless a rightful act when done. Can this performance of a legal duty—a duty both to stockholders and to the public—give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law the stronger is the claim to its enforcement by the courts." Thomas v. Railroad Co., 101 U. S. 86, 25 L. Ed. 950.

That the defendant in error has submitted to a void contract by which it has been deprived of the use of its property for two years, furnishes no sound reason why it shall submit for three years. To hold that it did would be to apply the doctrine of part performance in a way to perfect and legalize illegal contracts which were partly performed. We have not deemed it necessary to consider the question of the legality of such a combination of corporations as one tending to create a monopoly, for the ground upon which we place the case needs no additional prop. The question of the validity of such an arrangement is a very grave one, but need not now be considered.

The suggestion that, if this contract was void, yet nevertheless it operated to convert the managers of the combination into tenants from year to year, and that such tenancy could only be terminated at end of a year, and upon six months' notice, is not tenable. The relation of landlord and tenant never existed under the contract if it be considered as valid, and could not spring from its illegality. The Hanaur Mill Company had a right to repudiate the arrangement at any time, and it was the duty of plaintiffs in error to have at once surrendered possession. The service of a writ in a suit of unlawful detainer was the only notice they could legally demand. When the action of unlawful detainer will lie under our statutes, no other notice than the suing out of a writ is necessary. Code Mill & V. § 4082.

The result is that we hold that there was no error in the charge of the circuit judge, or his refusal to charge, and the judgment must be affirmed with costs.

FOLKES, J., having been of counsel, did not sit in this case.[67]

ST. LOUIS, V. & T. H. R. CO. v. TERRE HAUTE & I. R. CO.

(Supreme Court of the United States, 1892. 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748.)

GRAY, J.[68] The object of this suit between two railroad corporations, as stated in the amended bill, is to have a contract, by which the plaintiff transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the defendant for a term of 999 years, set aside and canceled, as beyond the corporate powers of one or both of the parties. * * *

In short, by this contract one railroad corporation undertook to transfer its whole railroad and equipment, and its privilege and franchise to maintain and operate the road, to another railroad corpora-

[67] See Atlantic & Pacific Telegraph Co. v. Union Pacific Ry. Co. (C. C.) 1 Fed. 745 (1880); Central Branch, Union Pacific Ry. Co. v. Western Union Telegraph Co. (C. C.) 3 Fed. 417 (1880); Western Union Telegraph Co. v. Burlington & S. W. Ry. Co. (C. C.) 11 Fed. 1 (1882); McCutcheon v. Merz Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415 (1896).

[68] Statement of facts and a part of the opinion are omitted.

tion for a term of 999 years, in consideration of the payment from time to time by the latter to the former of a certain portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorized by the state which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other. Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 630, 6 Sup. Ct. 1094, 7 Sup. Ct. 24, 30 L. Ed. 83, 284; Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55.

[After discussing the power of the corporation to make the lease, he proceeds:]

It may therefore be assumed, as contended by the plaintiff, that the contract in question was ultra vires of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other.

It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of ultra vires has undergone in the English courts within the last 50 years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts not of last resort, and present no sufficient reasons for maintaining this suit. Auburn Academy v. Strong, Hopk. Ch. (N. Y.) 278; Atlantic & P. Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 541, 1 Fed. 745; Western Union Tel. Co. v. St. Joseph & W. Ry. Co., 1 McCrary, 565, 3 Fed. 430; Union Bridge Co. v. Troy & L. R. Co., 7 Lans. (N. Y.) 240; Railway Co. v. Simpson (C. C.) 21 Fed. 533.

The English cases relied on by the plaintiff were either suits to set aside marriage brokage bonds, as in Drury v. Hooke, 1 Vern. 412, and Smith v. Bruning, 2 Vern. 392, nom. Goldsmith v. Bruning, 1 Eq. Cas. Abr. 89; or to recover back money paid for the purchase, without leave of the crown, of a commission in the military or naval service, as in Morris v. McCullock, Amb. 433, 2 Eden, 190. Those cases have sometimes been justified upon the ground that, the agreement being against the policy of the law, the relief was given to the public through the party. Debenham v. Ox, 1 Ves. Sr. 276; St. John v. St. John, 11 Ves. 526, 536; Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847. But Sir William Grant explained them as proceeding upon the ground that the plaintiff was less guilty than the defendant. Osborne v. Williams, 18 Ves. 379, 382. And Morris v. Mc-

Cullock can hardly be reconciled with his decision in Thomson v. Thomson, 7 Ves. 470, or with the current of later authorities.

The general rule, in equity, as at law, is in "pari delicto potior est conditio defendentis"; and, therefore, neither party to an illegal contract will be aided by the court, whether to enforce it, or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. Thomas v. Richmond, 12 Wall. 349, 355, 20 L. Ed. 453; Springs Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347; Story, Eq. Jur. § 298.

While an unlawful contract, the parties to which are in pari delicto, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. Adams, Eq. 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and canceled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense. Story, Eq. Jur. § 700a, and cases cited; Simpson v. Howden, 3 Mylne & C. 97; Ayerst v. Jenkins, L. R. 16 Eq. 275, 282.

When the parties are in pari delicto, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. Thomas v. Richmond, above cited; Ayerst v. Jenkins, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee that the conveyance cannot be considered the voluntary act of the grantor. Worcester v. Eaton, 11 Mass. 368, and 13 Mass. 371, 7 Am. Dec. 155; Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124; Bryant v. Peck & Whipple Co., 154 Mass. 460, 28 N. E. 678; Williams v. Bayley, L. R. 1 H. L. 200; Jones v. Society, [1892] 1 Ch. 173, 182, 185, 187.

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of 999 years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had re-

ceived from the state, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was in pari delicto with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration, from time to time, for 17 years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches. Harwood v. Railroad Co., 17 Wall. 78, 21 L. Ed. 558; Graham v. Railway Co., 2 Hall & T. 450, 2 Macn. & G. 146; Pfooks v. Railway Co., 1 Smale & G. 142, 164; Gregory v. Patchett, 11 Law T. (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him, and had no right to retain. Springs Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347; Bank v. Townsend, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107, and cases there cited.

But the case is one in which, in the words of Mr. Justice Miller, in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 316, 317, 6 Sup. Ct. 1094, 30 L. Ed. 83. See, also, Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 434, 468, 469, 6 Sup. Ct. 809, 29 L. Ed. 963; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 56, 57, 61, 11 Sup. Ct. 478, 35 L. Ed. 55.

Decree affirmed.[69]

[69] Compare Central Transportation Co. v. Pullman Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108 (1898).

IV. Ultra Vires Transfers as a Source of Title

D. & J. D. EDWARDS v. FAIRBANKS & GILMAN et al.

(Supreme Court of Louisiana, 1875. 27 La. Ann. 449.)

Morgan, J.[70] D. & J. D. Edwards obtained judgment against Fairbanks & Gilman for $17,609 45 for machinery furnished and work and labor performed in a refinery which is alleged to belong to the defendants.

Under execution the machinery was seized. Subsequently, certain sugars and molasses found in the refinery, and which had been refined there, were also seized.

The New Orleans Mutual Insurance Company claim that the machinery seized belongs to them. Cavaroc & Son aver that the sugars and molasses seized are their property. The insurance company claims the property under a notarial act, dated November 8, 1872, in which it is declared by Fairbanks & Gilman that they had sold certain machinery, etc., which is detailed in the act, to the company for $25,000, reserving to themselves the right of redemption within three years on the repayment of the like sum.

By the same act the machinery, etc., was to remain in the possession of Fairbanks & Gilman; the building in which it was located was rented to them for several years upon their paying a monthly rent therefor. To which the plaintiffs answer that, as an insurance company, the laws of Louisiana will not permit them to enter into any such contract as that now set up, and that the contract now insisted upon being in direct violation of their charter, as well as the law, can not be enforced against any third person not party or privy to it, who has rights independent of it, and growing out of it.

It may be admitted that the company had no right to purchase the property in question from Fairbanks & Gilman. Does that make the property liable to Fairbanks & Gilman's creditors in payment of their debts? We think not. If the company did any thing contrary to law, the result might be a forfeiture of its charter. But we do not understand the law to be that if a corporation acquires property in a manner even prohibited by law, the property thus acquired still belongs to the vendor who has received his price, and that it can be seized by his creditors to pay his debts. * * *[71]

[70] A part of the opinion is omitted.

[71] The dissenting opinion of Wyly, J., is omitted.

LEAZURE v. HILLEGAS.

(Supreme Court of Pennsylvania, 1821. 7 Serg. & R. 313.)

TILGHMAN, C. J.[72] Frederick Hillegas, the plaintiff below (who is defendant in error), claimed the land in dispute under a warrant and survey to Thomas Holt, who conveyed to George Armstrong, who conveyed to William Henry, who conveyed to the Bank of North America, who conveyed to James Ross, who conveyed to the plaintiff. On the trial of the cause several exceptions were taken to the opinion of the Court on points of evidence, on which exceptions this Court is now to decide. [After discussing the exceptions to the admission of certain documentary evidence, the court proceeds:]

But the great points in this cause are the capacity of the bank to take the land conveyed by William Henry's deed, and afterwards to convey the same to James Ross. There is no doubt that a corporation must be governed by the charter from which it derives its existence. It can do no act nor take any estate contrary to its charter. If therefore it can be shown that the Bank of North America is forbidden by its charter either to take or to convey the land contained in William Henry's deed, the plaintiff's action cannot be supported. By the 3d section of the Act of Incorporation (17th of March, 1787, 2 Sm. L. 399), the bank is made capable "to have, hold, purchase, receive, possess, enjoy, and retain lands, rents, tenements, goods, chattels, and effects of whatsoever kind, nature, or quality, to the amount of two millions of dollars and no more, and also to sell, grant, etc., the same lands, etc. Provided nevertheless, that such lands and tenements, which the said corporation are hereby enabled to purchase and hold, shall only extend to such lot and lots of ground, and convenient buildings, and improvements thereon erected or to be erected, which they may find necessary and proper for carrying on the business of the said bank, and shall actually occupy for that purpose, and to such lands and tenements which are or may be bona fide mortgaged to them as securities for their debts."

It is remarkable, that with regard to the holding of lands, the charter of this bank is more restricted than that of any other bank in the State, for all the others are enabled to hold, not only the lands which have been bona fide mortgaged to them by way of security for debts, but also those "which may be conveyed to them in satisfaction of debts previously contracted in the course of their business, or purchased at sales upon judgments which shall have been obtained for such debts." This difference of restriction must have arisen from the extreme jealousy of moneyed corporations which pervaded the mind of the Legislature when the Bank of North America was incorporated. It never could have been intended to place that

[72] Facts sufficiently stated in the opinion, a part of which is omitted.

bank on a worse footing than others, for it was the only one which risked its capital on a field altogether untried in America, and which had the merit of rendering essential service to the United States during the War of the Revolution. It would be improper therefore to carry the restriction by construction further than the words of the law plainly import.

The restriction is that the bank shall not purchase and hold. Purchasing and holding are very different things, and the consequences of each are very different. If the words had been that the bank should neither purchase nor hold, then it could have done neither one nor the other. But although purchasing and holding might have been thought dangerous, because of the power which it would have given the bank to bring too much land into mortmain, yet to purchase, subject to the statutes of mortmain, which authorized the Commonwealth to appropriate the land to its own use, could be attended with no danger. This construction would satisfy the jealous policy of the Legislature, preserve the community from the danger of too great a mass of real property held in mortmain, and at the same time put it in the power of the Commonwealth to act towards the bank as justice might seem to require. This is a consideration of no small importance; for when the directors of the bank accepted from William Henry a conveyance of his land at a fair price, in payment of a debt bona fide due, it would be hard to presume that they knew they were acting in violation of their charter.

But granting that the restriction in the charter did not extend to the simple act of purchasing, it may be asked, whence did the corporation derive the right to purchase, and what would be the situation of land purchased without a capacity of holding? The answer is that a corporation has from its nature a right to purchase lands, though the charter contains no license to that purpose. And in this respect the statutes of mortmain have not altered the law, except in case of superstitious uses. But since those statutes, it is necessary, in order to enable a corporation to retain lands which it has purchased, to have a license for that purpose; otherwise, in England, the next lord of the fee may enter within a year after the alienation, and if he do not, then the next immediate lord, from time to time, has half a year to enter, and for default of all the mesne lords the king takes the land so aliened forever. That this is the law appears from the following authorities: 2 Black. Com. 268, 269; Co. Lit. 2; 6 Vin. Ab. 265 (G. pl. 2), id. 266, pl. 8; Jenk. Cent. 270; 3 Com. Dig. 399 (f. 10), id. 401 (f. 15); 1 Rol. Ab. 513, I. 35; 10 Co. 30. But in Pennsylvania, where there are no mesne lords, the right would accrue immediately to the Commonwealth.

It has been objected, however, that according to the report of the Judges of this Court, made on the 14th December, 1808, in pursuance of an Act of Assembly requiring them to make a report of the English statutes which are in force in the Commonwealth, etc., it

appears that all conveyances of land to a corporation without license are absolutely void. I will consider this objection. The Judges reported the following statutes of mortmain: "7 Ed. I (Stat. 2), 13 Ed. I, c. 32, 15 Rich. II, c. 5, and 23 Hen. VIII, c. 10, which are in part inapplicable to this country and in part applicable and in force. They are so far in force that all conveyances by deed or will of lands, tenements, or hereditaments, made to a body corporate, are void, unless sanctioned by charter or Act of Assembly. So also are all such conveyances void made either to an individual or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a superstitious nature, and not calculated to promote objects of charity or utility." I have quoted the words of the report, and it is evident that the Judges could have no intent nor had they power to make any addition to the statutes, or in any manner to alter them.

Now, by reference to the statutes, it will appear that in all of them except, the 23 Hen. VIII, c. 10, the conveyance is not absolutely void, but the estate passes to the corporation, subject as before mentioned to the right of the several mesne lords, and, in their default, of the king, to enter and hold in fee. But by the statute of 23 Hen. VIII, c. 10 (which has been determined to extend to superstitious uses only, see 2 Black. Com. 273, 1 Co. Rep. 24), uses and trusts made and contrived in favor of religious persons or any bodies corporate for more than twenty years, shall be utterly void. Now the meaning of the report of the Judges is that according to the statute cited by them, conveyances to superstitious uses are absolutely void, and conveyances to corporations, to uses not superstitious, are so far void that these corporations shall have no capacity to hold the estates for their own benefit, but subject to the rights of the Commonwealth, who may appropriate them to its own use at pleasure; in other words, that such conveyances have no validity for the purpose of enabling the corporation to hold in mortmain.

But to support the plaintiff's title, it must be shown that the corporation had power, not only to take by purchase, but to alien. In this respect, I consider a corporation in the situation of an alien, who has power to take, but not to hold. That an alien may take by purchase (though not by descent), has been settled from the earliest times. It is so laid down in Co. Lit. 2, and I believe has never been questioned. Neither has it been questioned that the land is subject to forfeiture, and may be seized for the king after office found. But it has been questioned what is the right of the alien before office found for the king.

Without reference to English cases which leave the matter in doubt, we have the highest authority in our own country for saying that until some act done by the Commonwealth according to its own laws to vest the estate in itself, it remains in the alien, who may convey it to a purchaser, but he can convey no estate which is not de-

feasible by the Commonwealth. This principle was asserted by Judge Story, who delivered the opinion of the Supreme Court of the United States in the case of Fairfax's Devisee v. Hunter's Lessee, 7 Cranch, 603, 3 L. Ed. 453, and this was the opinion of the Supreme Court of Massachusetts in the case of Sheaffe v. O'Neil, 1 Mass. 256, cited by Judge Story.

It is reasonable in theory, and can have no ill effect in practice, that he who has a defeasible estate may convey a defeasible estate. Provided the right of the Commonwealth to defeat the estate granted by the alien remains entire, it is immaterial who holds the land until that right be prosecuted. Supposing, then, that the cases of the alien and the corporation be similar (and I see not how they can be distinguished), it follows that the deed from the Bank of North America to James Ross, conveyed a fee simple, defeasible by the Commonwealth. * * *

Upon the whole, I am of opinion that there was error in admitting the deed from the Bank of North America to James Ross without proof of the corporate seal, and that there is no other error in the record. The judgment is therefore to be reversed, and a venire facias de novo awarded.[73]

Judgment reversed, and a venire facias de novo awarded.

MADISON, W. & M. PLANK ROAD CO. v. WATERTOWN & P. PLANK ROAD CO.

(Supreme Court of Wisconsin, 1859. 7 Wis. 59.)

Bill in Equity to recover payments made by the Madison Company on account of a guaranty given to certain creditors of the Watertown Company at the request of the latter company, and to foreclose a mortgage given by the Watertown Company to the Madison Company to secure the guaranty. The Madison Company was chartered to build and operate a plank road from Milwaukee to Madison, which road was completed to Watertown. The Watertown Company was chartered to build and operate a plank road, from Watertown to Portland and westward. The guaranty in question was given to enable the Watertown Company to borrow money for the extension of its road. The latter Company defaulted on the loan and the Madison Company paid the same under its guaranty. The present action is to recover the amount so paid and foreclose the mortgage given as security.[74]

WHITON, C. J. However ungenerous it may seem, (to give the conduct of these defendants no harsher name,) for the defendants to re-

[73] See Banks v. Poitiaux, 24 Va. 136, 15 Am. Dec. 706 (1825).

[74] Statement of facts substituted.

fuse to pay the money which the plaintiffs have paid on their guaranty, we are of the opinion that this bill cannot be sustained. The charter of the plaintiffs conferred only the ordinary powers necessary for the purpose of constructing their road. It gave no more. Indeed, it is not contended that the guaranty which the plaintiffs acquired was expressly authorized by the charter; but it is contended, that as the guaranty was made for the purpose of enabling the Watertown & Portland Plank Road Company to construct their road "westwardly from Watertown along a route and through a district of country so nearly identical with that along and through which said complainants were authorized to extend their road from Watertown westward" that the power to make the guaranty for such a purpose may be fairly inferred from the general powers given to build their own road.

We do not think that the facts stated authorize any such inference. The complainants were authorized by their charter, and the amendments made to it, to construct their road from Milwaukee to Madison. They had completed the road from Milwaukee as far as Watertown, on the way to Madison. Instead of building the road between the last two named places, they (as stated in the bill) "determined to leave the field west of Watertown, at least temporarily, to the other company." That is to say, the complainants signed a guaranty for the purpose of enabling the Watertown & Portland Plank Road Company to borrow money with which to construct a road westwardly from Watertown, on a route nearly identical with their own, and abandoned, at least temporarily, the construction of the remainder of their road.

It is to be remembered that the bill does not allege that the route of the road which the Watertown & Portland Plank Road Company was to construct, extended to Madison, or that the road was in any way intended to connect the last mentioned town with Watertown or Milwaukee. In our opinion, the signing of the guaranty by the complainants, for the purpose stated in the bill, was clearly without authority, and created no legal obligation. It has not been contended by the complainants that a corporation could enforce a contract which it was not authorized to make by its charter; we shall therefore cite but few authorities upon the contrary doctrine. Angell & Ames on Corporations, §§ 111, 256, 258, 273, 391, 392, 393; Bank of Augusta v. Earle, 13 Pet. 587, 10 L. Ed. 274; People v. Utica Insurance Co., 15 Johns. (N. Y.) 383; Bank of U. S. v. Dandridge, 12 Wheat. 68, 6 L. Ed. 552; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629.

But the counsel for the complainants contends that "the defendants have had the money for which the bills and mortgage were given, for a lawful purpose; and it is inequitable and fraudulent for them now to set up the act of the plaintiff in aiding them to get the money or in paying it when it became due to Cramer and Birchard, to defeat a recovery upon their mortgage."

We do not think this view of the matter changes the legal rights of the parties. The plaintiff of course was aware of the extent of its own power. Those who managed the affairs of the corporation must have known that it had no authority to guaranty the payment of the notes or bonds of third persons, and that if they attempted to do so, no legal obligation could result from such attempt.

The payment of the money under such circumstances by the plaintiff was a payment in their own wrong, for which they cannot charge the defendants. The counsel for the complainants also claims that this contract of the complainants has been executed, and that, as it was not illegal, but at least only unauthorized by the charter of the company, the court should not now interfere to set it aside, after the defendants have reaped all its benefits, although, perhaps, it could not have been enforced. We cannot view the matter in this light. The contract, so far as it is relied upon for the purpose of affecting the defendants, is not executed, but executory merely. It is the foundation of the first action. The complainants seek to recover upon it, and upon it alone. We must regard it as wholly insufficient to authorize the action, and must therefore reverse the order of the circuit court. Order reversed and cause remanded for further proceedings.[75]

ST. PETER'S ROMAN CATHOLIC CONGREGATION v. GERMAIN.

(Supreme Court of Illinois, 1882. 104 Ill. 440.)

MULKEY, J.[76] The St. Peter's Roman Catholic Congregation brought to the February term, 1882, an action of ejectment, against Nicholas Germain, for the recovery of a valuable tract of land, situate in St. Clair county, consisting of about eighty acres. There was a judgment for the defendant in the court below, and the plaintiff brings the case here for review.

It appears, from a stipulation of the parties, that Catharine Agnes Germain, being the owner in fee of the premises, on the 2d day of November, 1878, executed and delivered to the plaintiff a deed therefor, properly acknowledged, and purporting to convey the same; that the plaintiff is, and was at the time of the conveyance, a religious corporation, organized and existing under the act of March 8, 1869, entitled "An act to provide for the holding of Roman Catholic churches, cemeteries, colleges, and other property" (Laws 1869, p. 67); and that at the time of said conveyance the plaintiff owned and

[75] Contra: Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 61 Atl. 167 (1905), semble; Savings Trust Co. v. Bear Valley Irr. Co. (C. C.) 112 Fed. 693 (1902), semble.

[76] Facts sufficiently stated in the opinion.

occupied more than ten acres of land in St. Clair county, exclusive of the land described in the deed.

Under these facts the question is presented—and indeed this is the only question in the case—whether the title to the land in dispute passed by the deed from Catharine Germain to the plaintiff. No question is made by counsel for defendant in error as to the form or sufficiency of the deed, or the manner in which it was obtained, or with respect to the right or power of the grantor to convey, but the only question made is as to the capacity of the plaintiff in error to take under the deed. The determination of this question depends upon the construction that must be given to the statutes then in force authorizing religious corporations to acquire lands in this State. By the 2d section of the act of 1869, above mentioned, religious societies organized under it are authorized "to receive, hold, dispose of, and convey, any kind of property," and by the 10th section the act is declared to be "subject to any limitation or modification which may hereafter be enacted by general law as to the amount of real estate to be held by the corporations, respectively, provided for herein." It will be perceived this act contains no limitation as to the quantity of lands religious societies incorporated under it may "receive" and "hold," but, as we have just seen, the legislature, by the 10th section, reserves the right to limit and modify the amount "to be held" by them.

At the time of the adoption of this act the 44th section of chapter 25, Revised Statutes 1845, entitled "Corporations," was in force, which authorized any religious society or corporation then existing, or which might thereafter be formed, "to receive, by gift, devise or purchase, any quantity of land not exceeding ten acres," etc. This act continued in force until in 1872 (Laws 1871–72, p. 296), when it was repealed, and section 42, of chapter 32, of the present revision, was adopted in its stead, which provides, that "any corporation that may be formed for religious purposes under this act, or under any law of this State, for the incorporation of religious societies, may receive, by gift, devise or purchase, land not exceeding ten acres," etc. By comparing the two sections it will be perceived that so far as the present inquiry is concerned, they are substantially the same, so that the adoption of the latter section was in effect merely continuing in force the former. This being so, it follows that in determining what, if any, effect the latter section had on the conveyance in question, it must be treated precisely as if it existed at the time of the adoption of the act of 1869.

The question then arises, assuming, as we do, the limitation contained in these two sections was in force at the time of the adoption of the act of 1869, and that it has continued to be in force ever since, what, if any, effect did it have on the conveyance in question? As already observed, the act of 1869 contains no limitation upon the power of a religious society or corporation organized under it to ac-

quire real estate, and if that act is to be given effect without regard to the limitation contained in the two sections we have been considering, it is clear the title to the land in question passed by the deed. But can such a construction of these acts be maintained upon legal principles? Both of the sections containing the limitation are undoubtedly conceived in terms sufficiently broad and comprehensive to include religious corporations organized under the act of 1869, as well as others, and no reason has been suggested, nor are we able to perceive any, why they do not so include them.

Would not religious societies organized under other acts have the same right, and with the same show of reason, to contend that they do not fall within the limitation? And if they are to be excluded from its operation also, what effect could be given to it? We see no fair, reasonable or just mode of enforcing the limitation, except by extending it to all religious societies alike. In doing so we but conform to the general, well recognized rule, that all statutes relating to the same subject should be construed in pari materia, so as to give them all their appropriate effect and operation; and courts have no right to depart from this rule unless there is some imperative reason for doing so, which is clearly not the case here. The fact that the legislature failed to impose a limitation in the act of 1869, is no evidence they intended there should be none. Why provide for such a limitation when there was already a general law imposing one? To have inserted a similar provision in that act would have been simply to declare what the law would be without it, and the fact that nothing was said on the subject is simply evidence that the existing limitation was satisfactory to the legislature.

In the light of judicial history, and the legislation of this country on the subject, we cannot for a moment believe that it was the intention of the legislature to put it in the power of any religious society or corporation to acquire lands to any indefinite extent, as is claimed here. It has ever been the policy of this country, including our own State, to keep landed estates as much unfettered as possible, so that their free transfer from one person to another may not be interrupted or hindered, and it will not be denied that to permit corporations to acquire real estate to an unlimited extent would be destructive of this policy. Under the legislation of our State, which we have been considering, a religious corporation is authorized to receive or acquire lands to the extent of ten acres, and no more. Any amount in excess of that is expressly forbidden by the statute, and it follows that all conveyances, deeds or other contracts made in violation of this prohibition, are absolutely void.

It is a well settled rule that where a corporation is forbidden to take or receive lands, such a prohibition goes to its capacity to acquire, and a deed made to it under such circumstances passes no title, such a conveyance being absolutely void; and the correctness of this rule is conceded by the learned counsel for plaintiff in error.

It is claimed, however, this rule only applies where the prohibition is total, and not merely partial, as in this case,—that where there is a capacity to take to a limited extent, and a conveyance is made for a quantity in excess of that which the law permits, the title will nevertheless pass to the whole, subject to the right of the State to interpose for the excess. We cannot give our adhesion to this doctrine, for it would be conceding that a corporate body might clothe itself with the legal title to an estate in contravention of an express provision of the statute, which is inconsistent with well recognized principles. Whether a deed of that kind would be good for the amount of land that might lawfully be conveyed, and inoperative for the residue, or whether it would be regarded as void for uncertainty as to what particular ten acres passed by it, it is not necessary for us to stop to inquire, for whatever might be the rule in such a case, it could have no application to the one before us. Here it is admitted the plaintiff in error had, previous to the conveyance of the land in dispute, already acquired, and was then the owner of ten acres of land,—the outside limit it was permitted to take. This being so, it is clear its capacity to acquire other lands was fully exhausted, and there was a total want of power to take the land in question.

Moreover, we are of opinion that conceding the act of 1869 was not adopted subject to the limitation contained in the 44th section of the act of 1845, as we have seen it was, nevertheless the reservation, in the 10th section of the former act, of the power to regulate by general law the amount or quantity of land which corporations organized under it might hold, fully authorized the legislature—assuming the power did not exist independently of it—to prescribe the amount or quantity of land which such corporations might take or acquire. If the legislature has the power—and this is conceded—to say these organizations shall not hold to exceed a specified number of acres of land, we are of opinion, as the most effectual way of enforcing such power, it may say they shall only take or acquire the specified quantity.

Leaving out of view the legal aspects of the question, it looks like a great hardship that the purposes of the grantor in the deed should be thus thwarted, and that the church should be deprived of the estate so generously attempted to be given to it; yet such considerations must not be permitted to disturb the balance of the scales of legal justice. "Ita lex scripta est," and it is the duty of all to submit to its mandate, and we are assured that none will do so more cheerfully than the plaintiff in this case.

The judgment of the circuit court is affirmed.

Judgment affirmed.

CRAIG, J. I do not concur in the decision of this case. The St. Peter's Roman Catholic Congregation, a corporation existing by law, under our statute had authority to take and hold lands by deed or devise, and whether it has exceeded its power in accepting a con-

veyance of the land in question, can, in my judgment, only be inquired into by the State. The question is one between the corporation and the sovereign power, in which individuals have no concern. De Camp v. Dobbins, 29 N. J. Eq. 36.

DICKEY, J. I concur with the view expressed by Mr. Justice CRAIG.[77]

In re McGRAW'S ESTATE.

In re FISKE'S ESTATE.

(Court of Appeals of New York, 1888. 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387.)

Jennie McGraw Fiske died in 1881, leaving a will, which directed that the estate be converted into money or available securities, and after the payment of numerous bequests, the residue to go to Cornell University to be added to "the McGraw Library Fund." The amount of the estate including a trust fund, created by the will of John McGraw, over which the testatrix had a power of disposition, was $2,275,933.46. The total amount bequeathed to Cornell University, specifically or as a part of the residue was $1,154,363.46. The statutes of the State of New York contain the following provisions touching the taking and giving of real estate by corporations:

1 R. S. pp. 599, 600, §§ 1, 2, 3: "Every corporation has power to hold, purchase and convey such real estate, personal estate, as the purposes of the corporation shall require, not exceeding the amount limited in its charter. * * *"

2 R. S. p. 57, §§ 1, 2, 3 (providing for disposition by will): "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise."

1 R. S. p. 460, §§ 31–37: "The trustees of every such college, besides the general powers and privileges of a corporation, shall have power * * * to take and hold by gift, grant or devise, any real or personal property, the yearly income or revenue of which shall not exceed the value of twenty-five thousand dollars."

Section 5, Charter of Cornell University, granted subsequent to the acts above set out, provides that the corporation hereby created may hold "real and personal property, not exceeding three millions of dollars in the aggregate."

The heirs and next of kin of the testatrix, and the beneficiaries under the will of John McGraw, contested the validity of the bequest to Cornell University on the ground that the property of the Univer-

[77] Compare Hamsher v. Hamsher et al., 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556 (1890).

sity already equaled or exceeded the amount it was authorized to hold under its charter. From an order of the Surrogate accepting the executor's report and directing the payment of the residue of the estate to Cornell University, the contestants appealed to the General Term of the Supreme Court. The present appeal is from their decision reversing the order of the Surrogate.[78]

PECKHAM, J.[79] [after commenting on the statutes]. Looking for a moment outside of and beyond the statute laws of the state, and in order to strengthen his position regarding the true construction to be given that law as to the material distinction in the case at least of a corporation, between the power to take and the power to hold property, the counsel for the appellant has made a most able and learned argument. Its outlines are, in substance, as follows: A corporation at common law could take and hold property by devise. At an early stage in the history of the law of England relating to the power of corporations to hold real property, and while the feudal system still prevailed, it was enacted that no man should alien his feud to a corporation under a penalty of a forfeiture thereof to his next superior of whom he held the land, and, in default of such superior insisting upon the forfeiture, then his superior might do so, and thus on, until the king, as the general superior and lord of all, was reached. But, in case the forfeiture was not insisted upon, the corporation, which had taken a defeasible title to the land, could hold it as against all the world.

He therefore insists that this distinction between taking and holding strengthens his claim that the use of the word "hold" in the charter was intentional, and for the specific purpose of permitting the corporation to take an unlimited amount of property, and to hold only the amount specified. No sound reason for giving such unlimited power to take, while limiting the power to hold, can, as it seems to me, be stated; and, if such were the intent, I think it would have been plainly stated in the charter, instead of trusting to such a conjectural application to be given to another statute.

The counsel cites about all the writers upon the subject of corporations, and they have all adverted to this distinction, as existing in relation to the English corporations subject to the mortmain statutes, and they state that licenses to hold in mortmain were granted to such bodies, but without such licenses they took the title to the real property aliened, subject only to the right of the superior lord to enter and take the land under the power of forfeiture. The only penalty, therefore, which a corporation risked when it took lands without a license in mortmain, was that of a forfeiture of the land to the next superior of the grantor, and so on up to the king; and the counsel claims that in this state, in the case of a corporation with unlimited power to take, but not to hold more than a certain amount, the penalty for holding

[78] Statement of facts substituted. [79] A part of the opinion is omitted.

more is that the state, representing the whole people and standing in this respect in lieu of the king, (there being no mesne lords,) can forfeit the charter of the corporation, and thus prevent the further holding; and, assuming this to be the fact, he uses it as strengthening his argument as to the existence of this clear and material distinction between taking and holding property.

The further claim is then made that, as title to the property has vested in the corporation, which, in holding it, has become subject to the forfeiture of its charter, the heirs or next of kin of the testator have no more right to raise the question than any other third parties who have no interest therein. It is said that it is a matter for the state alone to take cognizance of, and until it does the corporation holds the property, however much it may transcend the limitation prescribed in its charter.

The counsel states accurately the law of mortmain in England, and its consequences of possible forfeiture of the estate granted, and, until forfeiture, the vesting of the title in the corporation indefeasible, except by the re-entry of the person entitled to take it by reason of the forfeiture. But the circumstances under which lands are held by citizens of New York, where their tenure is so wholly different from that which prevailed in England when the early mortmain acts were enacted, render any argument in regard to those acts and their effect totally inapplicable to the case of a corporation of this state. Taking the law as it exists in our statutes, including the special provision upon the subject in the charter of the university it seems to me that the provision therein, limiting the holding of property, is, as I have said, a restriction also upon the power to take in excess of the specified amount. As, at common law, a corporation could take real property in the same way as an individual, the consequence was that in England large landed possessions were held by religious corporations, and, by reason of alienations of real estate to them, the services due by the vassal to the lord were partially, if not totally, paralyzed, and the chief lords lost their escheats. This was a constantly growing and alarming evil.

To remedy the difficulty, the first mortmain act was placed in magna charta, which declared all such alienations to corporations entirely void, and that the lands should revert to the lord in fee. It was held, however, that the reversion must be accomplished by an entry, and then and from that time there was a forfeiture, the corporation having taken the title and held the property until such forfeiture by re-entry. Shelf. Mortm. 8, 34; 1 Kyd, Corp. 81; Grant, Corp. 106. Other statutes upon the subject were subsequently enacted, all for the purpose of preventing the great accumulation of real property in the hands of corporations, and they all provided substantially for a re-entry on the part of the next superior lord whenever lands had been aliened in mortmain, and, until such entry enforcing the forfeiture, the corporation held the lands. There was one law, directed against

superstitious uses, (23 Henry VIII, c. 10), which provided that the grant to such uses for more than 20 years was absolutely void, and the estates thus aliened would have gone to the grantor or his heirs, excepting for a provision, subsequently made, giving such estates to the king. Wilm. 9, 10, in Attorney General v. Downing, variously reported; 2 Amb. 550, 571, 1 Dick. 414; Attorney General v. Bowyer, 3 Ves. 714, 5 Ves. 300, 8 Ves. 256. The mortmain statute (9 George II, c. 36) renders all devises to charitable uses void. Shelf. Mortm. 118–120.

The nature of the tenure of real property at the time of the passage of the early mortmain acts in England bears no resemblance to the tenure by which a citizen of this state holds lands. Here there is no vassal and superior, but the title is absolute in the owner, and subject only to the liability to escheat. Const. N. Y. art. 1, § 13. The escheat takes place when the title to lands fails through defect of heirs. Id. § 11.

A devise to a corporation which is forbidden to take (or forbidden to hold, if the word, under the circumstances of the case, is construed to include a taking also) does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but, if it be in violation of a statute, I think the devise is void, and the land descends to the heir or residuary devisee. We have not in this state re-enacted the statutes of mortmain, or generally assumed them to be in force, and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the acts by which they are incorporated and which usually confine the capacity to purchase real estate to specified and necessary objects. 2 Kent, Comm. 282. Of course, the restrictions contained in any general law, if applicable, must also be referred to.

There is by reference to our laws, no such necessary and universal distinction between taking and holding property by corporations as is seen in the laws of England relating to alienations in mortmain. Whether the legislature, when using language providing for a limitation upon holding property, meant to permit an unlimited taking, is a question of legislative intent; and I think the general inference would be, in the absence of some plain and controlling circumstance to the contrary, that the legislative body meant to limit a taking as well as a holding beyond the specified amount. As is said in the Chamberlain Case this is in accordance with the policy of the state,—a policy which has been recognized as existing for many years, and which the courts have concurred in approving and carrying out. I do not think the statute (Laws 1779, c. 25, § 13) touches this case. It provided that the absolute property of all lands, etc., and all rents, franchises, debts, dues, duties, and services, escheats and forfeitures, which before the 9th of July, 1776, vested in or belonged or were due to the crown of Great Britain, were, and forever after the 9th day of July,

1776, shall be, vested in the people of the state, in whom the sovereignty and seigniory thereof are and were united and vested.

The counsel for the appellant does not claim that this property was itself forfeited to the state, if the state should choose to enforce the forfeiture. His claim is, as I understand it, that if the university exceeded its limitation by holding more property than it was allowed by law to hold, a cause of forfeiture of the charter was thereby created, and that in enforcing such forfeiture, after the payment of the debts of the corporation, the rest of the property would (as he insists) probably go to the state, because there would be no living claimant to it who would have any right to acquire it. A forfeiture the state may claim and may enforce at pleasure, when the occasion arises, but it is a forfeiture of the charter, and not a forfeiture of the property held by the corporation.

It is further claimed that this distinction between the right to take and the power to hold property is one which has been admitted and enforced in the courts of England, of this state, and of the other states of the Union for a long number of years; and that there is no reason why effect to such a distinction should not be given in this case,—the result being, as is stated, that the corporation has an unlimited right to take property and also an unlimited right to hold it as against any one but the state in its capacity of sovereign. There is undoubtedly a distinction between the right to take and the power to hold property under some circumstances; the only question being whether the legislature had such distinction in mind, and meant to provide for it in the case in hand. It is said that an alien has the right to take property by purchase, but he cannot hold it as against the state. That is so. He takes, however, a defeasible title, good as to all but the sovereign power, which must take it upon office found or by escheat. Wright v. Saddler, 20 N. Y. 320.

In such case it is not exactly an accurate description of the alien's title to simply say that he can take, but cannot hold. That is a contradiction in terms. If he take, he must hold, if for but a fractional part of a second of time. The expression is but a short one for the statement that he cannot hold, as against the claim of the state, where properly made and enforced. The same expression is used in the case of a corporation under the mortmain laws, that it can take, but not hold; the meaning being that it cannot hold as against the claim for forfeiture, when made by the next superior lord of the grantor of the lands. That the words lose all their meaning when wrenched from the circumstances under which they were used, and applied to corporations existing by virtue of the laws of this state, seems to me a plain proposition. * * *

[After commenting on the decisions, the court proceeds:]

Under our general statutes upon the subject of the right to take or hold property by corporations, and reading them in connection with the provisions of the charter of the university, we should be

astute in our arguments against the application of the mortmain statutes, instead of in favor of them, if we should decide that the language of the charter did not apply as well to a taking as of a holding of property beyond the expressed limit.

There can be no doubt that it is the law, in this state at least, that, if there be a prohibition against the taking of property beyond a certain amount or value, a devise or bequest to a corporation of property which will exceed the amount or value which the corporation is permitted to take will be void for the excess. This is expressly decided in the Chamberlain Case [43 N. Y. 424], and we think it was rightly decided. Nor is there any doubt that in such a case the heirs or next of kin can raise the question. This was also decided in the same case. See, also, White v. Howard, 46 N. Y. 144. When we come to the conclusion, therefore, that this university is by law precluded (or was precluded at the time of the death of Mrs. Fiske) from taking more than the amount of property limited in its charter, we bring the case precisely within the rules laid down in the cases just cited.

The language of Chief Justice Beasley, in the case of De Camp v. Dobbins, 31 N. J. Eq. 690, is very appropriate here. He says: "Nor can I assent to the other proposition that if, as the contention assumes, this bequest is violative of the law if carried into effect, that none but the state can intervene. I find no warrant for such a doctrine, either in the legal principles belonging to the subject or in the adjudications. There can be no doubt that there are cases in which, where a corporation has acquired rights of property to an extent or in a manner unwarranted by its charter, no one but the public can have the right to complain. A grantor making title to a corporation might be estopped from questioning the effect of his own conveyance. So a mere stranger could not question such a corporate title. But I have not observed any decision that asserts, when a title is created by devise which vests in a corporation for its own use a larger quantity of property than the laws authorize, that the heir at law has no right to make objection. The authorities referred to do not lend countenance to such a doctrine."

The learned judge refers to the cases of Bogardus v. Trinity Church [4 Sandf. Ch. 633] and Leazure v. Hillegas [7 Serg. & R. (Pa.) 313] both cited supra, and continues: "These cases rest on the obvious principle that the capacity of the corporate body to become the grantee in the given case cannot be challenged by a party who does not stand in a position to raise the question. In such a position it would be true that the state alone could object to such corporate act. But such instances are to be discriminated from that other class, where the corporation claims to take and hold by devise, in contravention of law, and the heir of the devisor is the party complaining. In this latter situation the doctrine enforced in the cases does not

apply. * * * I have no doubt that the heir at law has a standing in court to raise such a contention, and that in a court of equity he would be entitled to prevail if he could succeed in establishing the proposition on which such defense rests." The court affirmed the judgment below on the ground that the corporation was not prohibited from taking the property.

The counsel claims, however, that a devise to a corporation vests the title in it, so far as the question of capacity is concerned, whenever it would in the case of a sale for a valuable consideration. Hence he says that the cases of sales above cited are decisive of this, if they be admitted as well decided. In the case of an executed sale, however, the question of ultra vires, as set forth in the modern cases, comes in play, and the question of a want of title in the corporation in such case would not be permitted to be raised by the grantor or his heirs, because it would be against justice and would accomplish a legal wrong. Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504.

The question of an executed gift without consideration by a donor, by an absolute delivery to a corporation without power to take, is also instanced, and the question is asked whether the title vests in such a case in the corporation so that the donor or his heirs could not recover it back, and, if it do, the counsel asks where is the difference in the two cases. It is time enough to decide such a case when it arises. But it seems to me there is a decided difference. In the one case the gift is made inter vivos by the absolute owner, and it is made effectual as to him by a delivery. In such case it would seem that he stands in no position to ask the aid of the court to get him out of a situation into which he voluntarily entered with his eyes open, and the court might well say to him that he stood in no position to attack the right of his donee to property which he freely and absolutely gave it. As to his heirs, it could be said that their ancestor had made a disposition of property which was absolutely his own in his life-time, and in such a way that he could not question its validity, and that, as he could not, they, succeeding only to his rights, were alike disabled.[80]

In the case of a devise, however, the case is essentially different. The will does not take effect until the testator's death, and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee, but it vests instantly in the heir or next of kin; and the corporation claiming under the will asks the aid of the law to give the property to it, and in so doing it must show the authority it has to take. And, if there were only a prohibition in words against holding the property, would the law not be doing a vain thing in handing it over to a corporation, which, by the very fact of holding, would render itself liable to have its

[80] See House of Mercy v. Davidson, 90 Tex. 529, 39 S. W. 924 (1897).

charter forfeited on that account? Would not the prohibition against holding be properly and necessarily construed as a prohibition against taking also? Is not this an argument against the right of the corporation to take, if by holding it is thus rendered liable to such a penalty? And is it not an argument in favor of the construction of the language in the charter that the limitation upon the power to hold property is, under all the circumstances, a limitation upon the power to take any more than it can legally and properly hold?

One more statement must be noticed. It is said that as the legislature, subsequently to the death of Mrs. Fiske, passed an act which took away any limitation on the power of the university to hold property, this action of the legislative department of the government throws a strong light upon what is the policy of the state regarding institutions of learning, and, in the view of appellants' counsel, waives the right which might have existed on the part of the state to claim a forfeiture of the charter of the corporation. But the policy of the state in relation to what may be called its mortmain laws is to be gathered from its statutes of general application on that subject, and cannot be said to be altered by the passage of special acts regarding particular corporations.

[After discussion of the question whether the property of the University exceeds $3,000,000, the court concludes:]

The judgment of the general term must be affirmed, with costs.[81] All concur, except FINCH, J., taking no part.

HUBBARD v. WORCESTER ART MUSEUM.

(Supreme Judicial Court of Massachusetts, 1907. 194 Mass. 280, 80 N. E. 490, 9 L. R. A. [N. S.] 689, 10 Ann. Cas. 1025.)

KNOWLTON, C. J.[82] This is a petition brought by the heirs of Stephen Salisbury, late of Worcester, deceased, for leave to file an information in the nature of a quo warranto against the respondent, under Rev.

[81] Harlan, J., in Christian Union v. Yount, 101 U. S. 352, at 361, 25 L. Ed. 888 (1879): "Appellees, in their pleadings, allege that the lots conveyed by their ancestor to the American & Foreign Christian Union were not required or necessary for the convenience or transaction of its business. These allegations are both insufficient and immaterial; insufficient, because they may be true, and yet the appellant, with the lots in dispute added to its property, may not have had more real estate than its charter permitted; immaterial, because if, as we hold, the appellant could consistently with its own charter and the law of Illinois take title to real property in that State for the purposes of its creation, its acquisition of a larger quantity of real estate than its charter allowed, or its business required, or was consistent with the law of Illinois, was not a question which the appellees have any right to raise. If the title passed by valid conveyance from their ancestor, it is of no concern to them that the appellant has acquired or is holding more real estate than its charter authorizes."

[82] A part of the opinion dealing with the cy pres doctrine is omitted.

Laws, c. 192, §§ 6–13. The Worcester Art Museum is a corporation, established under the provisions of Pub. St. 1882, c. 115 (Rev. Laws, c. 125), whose purposes, as set forth in the agreement for its organization, are "to found an institution for the promotion of art and art education in said Worcester, for erecting and maintaining buildings for the preservation and exhibition of works and objects of art, the making and exhibiting collections of such works, and providing instruction in the industrial, liberal, and fine arts; for holding real and personal estate in the furtherance of this purpose, and for the holding and administering of funds acquired by the corporation for these and kindred objects, in accordance with the will of the donors. All of such property and funds of the corporation, however, are to be held solely in trust for the benefit of all the people of the city of Worcester."

By the will of Mr. Salisbury this corporation is made his residuary legatee, and if the intention of the testator is carried out, it will receive, under the will, real and personal estate amounting in value to between $2,000,000 and $3,500,000. By Rev. Laws, c. 125, § 8, such corporations are authorized to "hold real and personal estate to an amount not exceeding one million five hundred thousand dollars." By St. 1906, p. 278, c. 312, enacted after the probate of the will, the right of this respondent to hold real and personal estate was enlarged to an amount not exceeding $5,000,000. The petitioners contend that, by reason of the limitation in the statute, the gift was void; that, as heirs at law of the testator, their rights in this part of his estate became vested on the probate of the will; that St. 1906 is prospective in its operation, and does not affect the right of the respondent to hold property under this will, and that, if it were construed as applying to property devised by this will, it would be unconstitutional and void.

The statute under which the petition is brought has been considered in Goddard v. Smithett, 3 Gray, 116, in Hartnett v. Plumbers' Supply Association, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194, and in other cases. We will assume in favor of the petitioners without deciding, that if they were right in their view of the questions of substantive law involved, it would be available to give them the remedy which they seek. We come directly to the effect of the residuary clause in the will.

The attack upon its validity may be considered from two points of view: First, in reference to the rights of testators, as against their heirs, to dispose of their property for charitable or other purposes; secondly, in reference to the provisions of the law giving this kind of corporations a right to hold property to an amount not exceeding a certain sum.

From the first point of view this gift is perfect and complete. Except for the protection of the statutory rights of a husband or wife, the power of a testator in this commonwealth to dispose of his estate by a will is unlimited. There is nothing in our law to restrain one from giving free course to his charitable inclinations, up to the last

moment of his possession of a sound, disposing mind. Making charitable gifts in this commonwealth is not against public policy, and we have no legislation, such as has long existed in England, and in New York and some of the other American states, putting obstacles in the way of such testamentary acts. The only ground of objection to this part of the will is not from the point of view of the testator or of his heirs, but on account of the provision of the statute regulating the rights of corporations as to the holding of property. We must, therefore, determine the meaning and effect of this statute on which the petitioners rely.

They contend that it is by implication an absolute prohibition against the holding, at any time, in any form, for any purpose, of a greater amount of property than that stated, and that any attempt of a corporation to hold more, or of any person to put more, into the ownership of a corporation, is illegal and absolutely void. The respondent contends that this implied limitation of the right to hold is made on grounds of public policy; that it is a provision only in favor of the state, which the state may enforce or not, as it chooses; that grants or devises in excess of the amounts stated are not void, but only voidable; that third persons cannot question the validity of such grants or devises, but that they are legal so long as the state leaves them undisturbed, and, that the state may at any time by a legislative act or in some other proper way, completely waive its right of enforcement.

In interpreting the act the history of earlier kindred provisions may be helpful. At common law, corporations were authorized to acquire and hold both real and personal property without limit. Matter of McGraw, 111 N. Y. 66–84, 19 N. E. 233, 2 L. R. A. 387. "The creation of a corporation gives to it, amongst other powers, as incident to its existence and without any express grant of such powers, that of buying and selling." Banks v. Poitiaux, 24 Va. 136, 15 Am. Dec. 706. "A corporation has, from its nature, a right to purchase lands, though the charter contains no license to that purpose." Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313. See, also, Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378; Mallett v. Simpson, 94 N. C. 37–41, 55 Am. Rep. 595.

Under the feudal system, when land was given to a corporation, the chief lords of whom the land was held, and the king as ultimate chief lord, lost their chances of escheat, and various other rights and incidents of military tenure. During the Middle Ages, the accumulation of land in the ecclesiastical corporations was so great as to be thought a national grievance. Hence the English mortmain acts, which go back for their origin to Magna Charta, St. 9 Hen. III, c. 36, and which have continued with various modifications to this day. See St. 7 Edw. I, c. 2, St. 15 Rich. II, c. 5; Shelford on Mortmain, 2, 6, 8, 16, 25, 34, 39, 809, 812; Tyssen on Charitable Bequests, 2, 383. Under these acts the alienations were not void, so as to let in the grantors and their heirs; but they merely operated as a forfeiture which gave a right to the mesne lord and the king to enter after due inquest. This right

to enter was often waived by a license in mortmain. See citations above, and Tyssen on Charitable Bequests, 383; St. 7 & 8 Wm. III, c. 37. In form these licenses commonly authorized a holding of property "not exceeding" a certain value. In later years this authority sometimes has been inserted in the charter, and this limited power of purchase has, it is said, been exceeded by almost all corporations. Shelford on Mortmain, 55. See, also, pages 10, 44, 49, 56, 891; Tyssen on Charitable Bequests, 393, 394, 396.

Another act, St. 9 Geo. II, c. 36, which is usually called the "Mortmain Act," but is called by Tyssen the "Georgian Mortmain Act," is of a very different nature. One of its purposes, as declared in the preamble, is to avoid "improvident alienations or dispositions made by languishing or dying persons to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs." Considered in reference to its purposes, it is not properly called a mortmain act. It applies only to gifts for charitable uses; and under it all such gifts, unless made as the statute allows, are absolutely void.

We never have had any real mortmain acts in Massachusetts. The nearest approach to one was the provincial statute of 28 Geo. II. Acts 1754, c. 12 (January 12, 1755); 3 Prov. Acts (State Ed.) p. 778. This made deacons a corporation to take gifts for charitable purposes, limited the grants to such as would produce an income not exceeding £300 a year, and provided that they should be made by deed, three months before death, and that all bequests, devises or later grants should be void. This statute related only to gifts to deacons, and was repealed by St. 1785, p. 532, c. 51 (February 20, 1786); 1 Mass. Laws, p. 282—which re-enacted a part of the law, but omitted the provision that gifts not authorized by the act should be void. Bartlet v. King, 12 Mass. 537–545, 7 Am. Dec. 99. See Rev. Laws, c. 37, § 1.

The significance of this reference to English law and to our legislation is, first, that, except for this short period, we have never had in Massachusetts any legislation prohibiting charitable gifts to trustees or corporations, or providing that any kind of conveyances, devises or bequests to corporations shall be void. On the other hand, the policy of the commonwealth, as expressed both by legislation and the decisions of its courts, has been exceedingly liberal to testators and public charities. Sanderson v. White, 18 Pick. 328, 333, 334, 29 Am. Dec. 591; American Academy v. Harvard College, 12 Gray, 582, 595, 596; Saltonstall v. Sanders, 11 Allen, 446; Jackson v. Phillips, 14 Allen, 539–550. Secondly, the implied limitations upon the power of corporations to hold property, which appear in numerous enactments, have been made not in the interest of grantors or devisors or their heirs, but in the interest of the state, on considerations of public policy.

The general form of these limitations, which appears in the statute before us, and with slight variations in special charters (a list of which 274 in number, granted in this state before 1850, has been furnished us through the industry of counsel), corresponds with the form

of licenses granted by the crown in England under the old mortmain acts, and sometimes embodied in charters granted by Parliament. Under these English acts, grants or devises to a corporation to hold property without a license, or in excess of the amount licensed, were not void, but only voidable by the mesne lord, or the king, upon entry, after inquest according to law. In view of the close relations between Massachusetts and the mother country in early times, this justifies an argument, of considerable strength, that the implied limitations in our statutes were intended to have no greater force than the old mortmain acts of England, as distinguished from the Georgian mortmain act.

We start with the inherent right, already referred to, of every corporation to take and hold property at common law, by virtue of the act of its creation. This right is recognized in our statutes by implication, without express mention. Rev. Laws, c. 109, §§ 4–6. What force is to be given to the words, "may hold real and personal estate to an amount not exceeding one million five hundred thousand dollars"? The respondent contends that their meaning is as if words were added as follows: "And beyond that amount it shall have no right as against the commonwealth, and the commonwealth may take proper measures, through action of the Attorney General or otherwise, to prevent or terminate such larger holding." According to the argument, a taking and holding by a corporation, above the prescribed amount, is under its inherent right. As between it and the state as the guardian of the public interest, a provision as to amount is made, which does not affect its right as to third persons. As to the general legality of the holding, except when the state chooses to enforce the law for its own benefit, the condition is similar to that resulting from a statutory provision which is merely directory. It is not very unlike the old law as to conveyances to aliens. Such conveyances, whether by grant or devise, were good against every one but the state, and could be set aside only after office found. Fox v. Southack, 12 Mass. 143; Waugh v. Riley, 8 Metc. (Mass.) 290; Judd v. Lawrence, 1 Cush. (Mass.) 531; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142. * * *

The counsel for one of the petitioners says in his brief: "It is fully conceded at the outset that where a corporation takes and holds property by conveyance, or by executed gift inter vivos, contrary to its charter rights, no one but the state can complain. This is settled by a practically unbroken line of decisions in all the states," etc.

But if the statute were a prohibition that renders the holding utterly void, and the taking also void, as is argued in the opinion in Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387, anybody interested could take advantage of the violation of law, unless he was precluded by estoppel. Most of the cases which we have cited do not put their decision on the ground of estoppel. Often the question might arise when there was no estoppel. The ground on which most of the cases go is that the implication is not an absolute prohibition,

but only a condition affecting the rights of the corporation as between it and the state. If the holding were an illegality which was utterly void, the condition would be the same whether the taking was by grant or devise, and a variety of unfortunate consequences might follow. The property might greatly increase in value after its acquisition, as was the case in Evangelical Baptist Society v. Boston, 192 Mass. 412, 78 N. E. 407. In that case, although the property of the corporation largely exceeded in value the amount authorized by the statute, there was no intimation that the holding was illegal, so long as the state did not interfere. See, also, Humbert v. Trinity Church, 24 Wend. (N. Y.) 587–605. As to all interests of private persons, in the absence of interference by the state, the cases generally treat titles to property held by corporations in excess of the specially authorized amount as good. They allow the corporations to give good titles to purchasers of such property.

Some judges, in holding that such titles cannot be taken under wills, endeavor to found a distinction upon the executed character of a title by grant, and suggest that a devise or bequest is executory. It seems to us that there is no good reason for the distinction. When a will is proved and allowed, it takes effect immediately to pass all property affected by it. The provision in the law against large holdings by corporations has no relation to the probate of the will. The act of the testator in executing the will is confirmed and given effect as a complete and executed disposition of the property, by the allowance of the will. In this respect a recorded will does not materially differ from a delivered deed. The heirs at law are bound by one as well as by the other.

The decisions upon the precise point at issue are conflicting. In Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, a case similar to that now before us, it was held by the court, in an opinion by Mr. Justice Gray, that "restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons." In the same case in the circuit court the question had been considered previously, and the same result was reached, in an opinion by Mr. Justice Bradley of the Supreme Court of the United States, which is found in 3 Woods, 443–475, Fed. Cas. No. 7,465. The same rule is established in Maryland. Hanson v. Little Sisters of the Poor, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293; In re Stickney's Will, 85 Md. 79–104, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308. De Camp v. Dobbins, 29 N. J. Eq. 36–40, was decided by the chancellor on this ground. The decree was affirmed on another ground in the Court of Errors and Appeals, 31 N. J. Eq. 671–690, in an opinion by Beasley, C. J., which contains a dictum disapproving of the view of the chancellor. In Farrington v. Putnam, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339, the court, in a very elaborate opinion, in a case identical in its leading features with that now before us, held that the gift was good. The

same doctrine is stated in Brigham v. Brigham Hospital (C. C.) 126 Fed. 796–801, s. c. 134 Fed. 513–527, 67 C. C. A. 393. It is also stated in text-books. Beach on Corporations (Purdy's Ed.) § 825; 2 Thompson on Corporations, §§ 5795–5797.

The leading case which presents the opposite view is Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387. Although the decision necessarily puts a construction upon a statute of that state, this construction seems to be materially affected by the policy of New York in reference to charities. Said Judge Peckham, who delivered the opinion: "We have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation, unless specially permitted by its charter or by some statute to take property by devise." In Chamberlain v. Chamberlain, 43 N. Y. 424, the court refers to the prohibition of devises, and to Laws N. Y. 1860, p. 607, c. 360, still in force, which makes void all bequests or devises to charity in excess of one-half the testator's property, where he leaves relatives. Other statutes have been passed, limiting the amount that can be devised to certain corporations by one testator, forbidding a devise or bequest to charities, by a person leaving relatives, of more than one-fourth of his estate, and making void such gifts where the will was executed within two months before the death of the testator. 4 Heydecker's Gen. Laws (1901) pp. 4885, 4891, 4892, c. 53. The policy of that state in regard to charities has been very unfavorable. See Allen v. Stevens, 161 N. Y. 122, 139, 140, 55 N. E. 568; People v. Powers, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502; Fosdick v. Hempstead, 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715.

The doctrine of the New York court is stated as the law in Trustees of Davidson College v. Chambers' Executors, 56 N. C. 253, and adopted in Wood v. Hammond, 16 R. I. 98–115, 17 Atl. 324, 18 Atl. 198, and House of Mercy v. Davidson, 90 Tex. 529, 39 S. W. 924. In the case in North Carolina the decision was by two of the three judges of the court, the chief justice giving an able dissenting opinion. The courts in Kentucky and Tennessee have expressed approval of the McGraw Case in New York, but in terms that do not leave the grounds of their decisions entirely clear. Cromie's Heirs v. Louisville Orphans' Home Society, 3 Bush (Ky.) 365–383; Heiskell v. Chickasaw Lodge, 87 Tenn. 668–686, 11 S. W. 825, 4 L. R. A. 699. In reference to supposed errors in the opinion in the last case, see Pritchard on Wills, § 153, note, and Farrington v. Putnam, 90 Me. 405–433, 37 Atl. 652, 38 L. R. A. 339.

In the construction of our statute, when the question arises whether a different rule shall be established in regard to the taking and holding by a corporation under a will from that which is universally laid down in regard to a holding under a deed, we are much influenced by the policy of our law as to devises and bequests for charitable purposes. We are of opinion that, under Rev. Laws, c. 125, § 8, a gift to a corporation under a will, to an amount in excess of the sum

specially authorized, should be held no less valid than a similar acquisition of title under a deed. It is good as against every one but the commonwealth. It follows that the St. 1906, p. 278, c. 312, operated as a waiver of the commonwealth's right to terminate the holding, and a legislative declaration of the entire validity of the provision in the will. * * *[88]

V. ESTOPPEL

MONUMENT NAT. BANK v. GLOBE WORKS.

(Supreme Court of Massachusetts, 1869. 101 Mass. 57, 3 Am. Rep. 322.)

HOAR, J. The single question presented for our decision in this cause, all others which arise upon the report having been waived, is, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, cannot be enforced against them, because it was in fact made as an accommodation note.

The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any persons taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defence cannot be maintained.

It has long been settled in this Commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. Narragansett Bank v. Atlantic Silk Co., 3 Metc. 282. And it was held in Bird v. Daggett, 97 Mass. 494, as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully stated, in Bird v. Daggett; but it was assumed that the doctrine announced was clear and undoubted law.

[88] Compare Farrington v. Putnam, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339 (1897); Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401 (1882); Congregational Church Building Society v. Everett, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308 (1897); Hamsher v. Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556 (1890).

The doctrine of ultra vires has been carried much farther in England than the courts in this country have been disposed to extend it; but, with just limitations, the principle cannot be questioned, that the limitations to the authority, powers, and liability of a corporation are to be found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of ultra vires does not apply. As was said by Selden, J., in Bissell v. Michigan Southern & Northern Indiana Railroad Co., 22 N. Y. 289, 290: "There are no doubt cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized. It would not be available in a suit brought by a bona fide indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented, that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of ultra vires is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

This doctrine seems to us sound and reasonable; and in conformity with it, it was held in Farmers' & Mechanics' Bank v. Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275, that an accommodation acceptance by an officer of a manufacturing corporation, on behalf of the company, was not binding, unless the consideration had been advanced upon the faith of the acceptance; but that if the consideration was paid in good faith after the acceptance, and upon the credit of it, it could be enforced.

So it was said by Lord St. Leonards that he felt a disposition "to restrain the doctrine of ultra vires to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into." Eastern Counties Railway Co. v. Hawkes, 5 H. L. Cas. 331, 373.

The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or for the most part those in which the other contracting party had notice upon the face of the transaction of the want of corporate power.

There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful acts of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this Commonwealth, for one committed by its servants.

Bills of a bank issued without consideration, and even stolen, are good in the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests.[84]

Judgment for the plaintiffs.

FRANKLIN CO. v. LEWISTON INSTITUTION FOR SAVINGS.

(Supreme Judicial Court of Maine, 1877. 68 Me. 43, 28 Am. Rep. 9.)

WALTON, J.[85] The claim which we are required to pass upon originated in this way:

In April, 1875, the trustees of the Lewiston Institution for Savings subscribed for $50,000 worth of the capital stock of the Continental Mills, one of the manufacturing corporations doing business at Lewiston. The savings bank had no money with which to pay for the stock, and in July following the Franklin Company, another corporation doing business at Lewiston, agreed to pay the $50,000 to the Continental Mills, take the notes of the savings bank for the amount, and hold the stock as security. Five notes for $10,000 each, payable in one year from date, with interest semi-annually, were prepared and signed by the treasurer of the savings bank, and sent to William B. Wood, at Boston; and he being treasurer of

[84] Accord: Moss v. Rossie Lead Mining Co., 5 Hill (N. Y.) 137 (1843), semble; In re Coltman, L. R. 19 Ch. D. 64 (1881); In re David Payne & Co., Ltd., L. R. 1904, 2 Ch. 608; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300 (1869), semble; Ossipee Mfg. Co. v. Canney, 54 N. H. 295 (1874).

Compare Wright v. Pipe Line Co., 101 Pa. 204, 47 Am. Rep. 701 (1882).

[85] A part of the opinion is omitted.

the Continental Mills as well as treasurer of the Franklin Company, paid the money in his latter capacity to himself in his former capacity, and afterwards (when does not appear) made a certificate, signed by himself and the president of the Continental Mills corporation, stating that the Franklin Company was the "proprietor of five hundred shares in the Continental Mills, as collateral." It does not appear that this certificate was ever delivered to the savings bank, or offered to them, or that any of its officers ever knew of its existence. And it does not show upon its face that the savings bank has any interest in the stock, or connection with it whatever. The Lewiston Institution for Savings having become insolvent, in May, 1876, commissioners were appointed to receive and decide upon all claims against the institution. The Franklin Company presented for allowance the five notes above described, and afterwards filed a claim for $50,000 and interest, as so much money paid out by the Franklin Company at the request and for the benefit of the savings institution. Both claims were rejected by the commissioners, and the case is before the law court on report agreed to by counsel. There is no other consideration for the notes, and no other basis for the claim for money paid, than the payment to the Continental Mills above described. The claims, therefore, are one in substance, although presented in two forms.

[After discussing the power of the trustees to make the instrument in question, the Court proceeds:]

II. The second ground on which the claim of the Franklin Company is sought to be maintained is this; it is said that where a corporation is authorized to hire money for any purpose, mere knowledge on the part of the lender that it is to be used for an illegal purpose will not preclude a recovery. This may be true.[86] But the claim in this case is not for money lent. It is for money paid. And the latter is the only claim which the evidence tends to support. Ordinarily such a distinction is unimportant. But in this case it is vital. It is the hinge on which the case turns. It may be true that when money is lent, and the borrower is left free to use it as he pleases, mere knowledge on the part of the lender that the borrower intends to use it for an illegal purpose will not bar a recovery. But it is well settled that if it be a part of the agreement that the money shall be used for an illegal purpose, or anything is done by the lender in furtherance of such a use of the money, a recovery therefor cannot be had. Thus, the mere knowledge of the lender that the borrower of money intends to gamble with it, if, by the terms of the agreement, the latter is left free to use it as he pleases, may not constitute a bar to a recovery of it. But it is well settled that if

[86] See Marion Trust Co. v. Crescent Loan Co., 27 Ind. App. 451, 61 N. E. 688, 87 Am. St. Rep. 257 (1901); Sturdevant Bros. & Co. v. Farmers & Merchants Bank, 69 Neb. 220, 95 N. W. 819 (1903).

the money is lent for the express purpose of enabling the borrower to gamble with it, a recovery cannot be had. Cannan v. Bryce, 3 Barn. & Ald. 179; McKinnell v. Robinson, 3 M. & W. 434; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132.

As already stated, there is no claim in this case for money lent. And the evidence would not support such a claim, if there was one. The money was never for a moment in the possession of the bank. Never, for a moment, did the bank possess either the right or the power to use the money as it pleased. The agreement was that the Franklin Company should pay for the stock for which the trustees of the bank had subscribed, and take the stock and hold it as security. We thus see that by the very terms of the agreement the money was to be applied to a specified purpose, and that purpose an illegal one. We use the word "illegal," not in the sense of malum in se, nor malum prohibitum, but in the sense in which it is used to describe the unauthorized acts of corporations,—acts and contracts ultra vires. * * *

III. Another ground on which the Franklin Company claims to recover is that, when a contract has been executed, in whole or in part, and the corporation has thereby received a benefit, a recovery may be had by the other contracting party to the extent of the benefit thus conferred, notwithstanding the contract was ultra vires. It is a sufficient answer to this argument to say that the case fails to show that the savings bank has been thus benefited. The $50,000 paid by the Franklin Company was paid directly to the Continental Mills. Not a cent of it ever came into the possession of the savings bank. The stock for which the $50,000 was paid was issued directly to the Franklin Company. The title never for a moment vested in the savings bank. Although, by the terms of the agreement, the Franklin Company was to hold the stock as collateral security merely, still, the agreement, being ultra vires, cannot be enforced. Nothing possessing the slightest intrinsic value, not even a right of action, was ever secured to or vested in the savings bank. There is absolutely nothing on which a quantum meruit or a quantum valebat claim can be sustained.

Decision of the commissioners affirmed. Claim of the Franklin Company disallowed.

APPLETON, C. J., and BARROWS, VIRGIN, PETERS, and LIBBEY, JJ., concurred.

LOUISVILLE, N. A. & C. R. CO. v. LOUISVILLE TRUST CO.

(Supreme Court of the United States, 1899. 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081.)

This was a bill in equity filed April 9, 1890, in the circuit court of the United States for the district of Kentucky, by the Louisville, New

Albany & Chicago Railway Company (hereafter called the "New Albany Company"), described as "a corporation duly organized and existing under the laws of the state of Indiana," against the Ohio Valley Improvement & Contract Company (hereafter called the "Construction Company"), the Richmond, Nicholasville, Irvine & Beattyville Railway Company (hereafter called the "Beattyville Company"), and the Louisville Trust Company, all corporations of the state of Kentucky, and other citizens of Kentucky, of New York, and of Illinois, for the cancellation of a contract between the New Albany Company and the Construction Company, and of a guaranty indorsed by the New Albany Company, in accordance with that contract, upon bonds issued by the Beattyville Company, and held by the other defendants, and for an injunction against suits thereon. The Louisville Banking Company, a corporation of Kentucky, and other bondholders, were afterwards made defendants by a supplemental bill.

The bill alleged that the guaranty was fraudulently placed on the bonds of the Beattyville Company by a minority of the plaintiff's directors, who, as individuals, had secured the option to buy the bonds at a low price, and also averred that the guaranty was void for want of the presence of a quorum of the directors at the meeting which directed it to be executed, as well as for want of a previous petition in writing by a majority of the stockholders, pursuant to a statute of Indiana.

Pleas to the jurisdiction, asserting that the plaintiff was a corporation and a citizen of Kentucky, as well as demurrers to the bill for want of equity, were overruled by the court. 69 Fed. 431, 432; 57 Fed. 42.

The case was afterwards heard upon pleadings and proofs, and, so far as is material to be stated, appeared to be as follows:[87] * * *

Mr. Justice GRAY.[88] [After discussing questions of jurisdiction, the court proceeds:]

The statute of Indiana of 1883 is entitled "An act to authorize railroad corporations organized under the laws of the state of Indiana to indorse and guarantee the bonds of any railroad company organized under the laws of any adjoining state," and enacts, in section 1, that "the board of directors of any railway company organized under and pursuant to the laws of the state of Indiana, whose line of railway extends across the state in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds." Section 2 pro-

[87] Statement of facts abridged.

[88] A part of the opinion is omitted.

vides that such petition of the stockholders shall state the facts relied on to show the benefits accruing to "the company indorsing or guaranteeing the bonds"; and section 3 provides that "no railway company shall, under the provisions of this act," indorse or guarantee such bonds to an amount exceeding half the par value of the stock of "the railway company so indorsing or guaranteeing."

The Louisville, New Albany & Chicago Railway Company was a railway company organized under and pursuant to the laws of Indiana, and its line of railway extended across the state from south to north. On October 8, 1889, the board of directors, at a regular meeting, passed a resolution, entered upon its records, authorizing the president and secretary to execute, under seal of the company, a contract by which the company agreed with a corporation which was constructing the railroad of the Beattyville Company, a railroad corporation of Kentucky, to guarantee the payment by the Beattyville Company of the principal and interest of bonds of that company, by indorsing on each bond a guaranty, executed in like manner, by which, "for value received, the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment, by the obligor thereon, of the principal and interest thereof in accordance with the tenor thereof." The contract, as well as the guaranty on many of the bonds, was accordingly executed by the president and secretary, and under the seal of the company, and the contract was spread upon the records of the board of directors. No petition of a majority of the stockholders for the execution of the guaranty was ever presented, as required by the statute; there was no evidence that the stockholders ever authorized or ratified the contract or the guaranty; and, at the next annual meeting of the stockholders, in March, 1890, it was voted to reject and disapprove both the contract and the guaranty, as having been made without legal authority or the approval of the stockholders.

Before that meeting was held, 125 of the bonds thus guaranteed had been sold by the Construction Company to the Louisville Trust Company, and 10 bonds to the Louisville Banking Company, each of which companies took these bonds in good faith and without notice that no petition had been presented by a majority of the stockholders for the execution of the guaranty.

Forty-five more of the bonds were purchased by the Louisville Banking Company from the Construction Company after that meeting, and with notice that a majority of the stockholders had never petitioned for, but had disapproved, the execution of the guaranty. The Louisville Banking Company, thus having notice, when it took these 45 bonds, that the prerequisite to the execution of the guaranty, under the statute of Indiana of 1883, had not been complied with, was not a bona fide holder of these bonds, and should not be allowed to enforce the guaranty thereon against the plaintiff.

The controverted question is whether the bonds which the Louisville Trust Company and the Louisville Banking Company, respectively, purchased in good faith, and without notice of the want of the assent of the majority of the stockholders, are valid in the hands of these companies.

The guaranty by the Louisville, New Albany & Chicago Railway Company of the bonds of the Beattyville Company was not ultra vires, in the sense of being outside the corporate powers of the former company; for the statute of 1883 expressly authorized such a company to execute such a guaranty, and its board of directors to direct its execution by the company. The statute, indeed, made it a prerequisite to the action of the board of directors that it should be upon the petition of a majority of the stockholders; but this was only a regulation of the mode and the agencies by which the corporation should exercise the power granted to it.

The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court.

It was clearly indicated in two of its earliest judgments on the subject of ultra vires, both of which were delivered by Mr. Justice Campbell.

In Pearce v. Railroad Co., 21 How. 441, 16 L. Ed. 184, two railroad corporations of Indiana were held not to have the power to purchase a steamboat to be employed on the Ohio river, to run in connection with their railroads, because this "diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. * * * Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. * * * The public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority," and the contract in question "was a departure from the business" of the railroad corporations, and "their officers exceeded their authority." 21 How. 443, 445 (16 L. Ed. 184).

In Zabriskie v. Railroad Co., 23 How. 381, 16 L. Ed. 488, the statutes of Ohio empowered railroad corporations, "by means of their subscription to the capital stock of any other company, or otherwise," to aid it in the construction of its road, for the purpose of forming a connection between the two lines, provided that no such aid should be furnished until two-thirds of the stockholders represented and voting, at a meeting called by the directors, should have assented thereto. The directors of three railroad corporations made a contract with another railroad corporation to guarantee its bonds, as part of an arrangement for connecting the four roads; and the

bonds were accordingly guaranteed, and were issued to bona fide holders, without any meeting of the stockholders having been called. But, upon evidence that the stockholders had subsequently assented to the transaction, the bonds were held to be valid; and the court expressly declared that the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of its organization, does not apply to "those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard." 23 How. 398, 16 L. Ed. 488. * * *

One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary, in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation.

In Merchants' Bank v. State Bank, 10 Wall. 604, 644, 645 (19 L. Ed. 1008), this court stated, as an axiomatic principle in the law of corporations, this proposition: "Where a party deals with a corporation in good faith (the transaction is not ultra vires), and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." The proposition was supported by citations of many English and American cases, and among them Bank v. Turquand (1856) 6 El., & Bl. 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated Bank v. Turquand as well decided upon its facts. Knox County v. Aspinwall, 21 How. 539, 545, 16 L. Ed. 208; Moran v. Miami County, 2 Black, 722, 724, 17 L. Ed. 342; Gelpcke v. City of Dubuque, 1 Wall. 175, 203, 17 L. Ed. 520; St. Joseph Tp. v. Rogers, 16 Wall. 644, 666, 21 L. Ed. 328; Humboldt Tp. v. Long, 92 U. S. 642, 650, 23 L. Ed. 752. And see Zabriskie v. Railroad Co., 23 How. 381, 16 L. Ed. 488, above cited.

Bank v. Turquand was an action upon a bond signed by two directors, and under the seal of the company, and given for money borrowed by a joint stock company formed under an act of parliament limiting its powers to the acts authorized by its deed of settlement, and whose deed of settlement provided that the directors might

so borrow such sums as should, by a resolution passed at a general meeting of the company, be authorized to be borrowed. The defense was that no such resolution had been passed, and that the bond had been given without the authority of the shareholders. The court of exchequer chamber, affirming the judgment of the queen's bench, without passing upon the sufficiency of the resolution in that case, held the company liable on the bond, and, speaking by Chief Justice Jervis, said: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, in reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done." 6 El. & Bl. 332.

The decision in Bank v. Turquand has been followed, and Lord Wensleydale's dicta to the contrary, a year later, in Ernest v. Nicholls (1857) 6 H. L. Cas. 401, 418, 419, have been disapproved or qualified, in a long line of decisions in England. Agar v. Society (1858) 3 C. B. (N. S.) 725, 753, 755; Society v. Harding (1858) El., Bl. & El. 183, 221, 222; In re Athenæum Soc. (1858) 4 Kay & J. 549, 560, 561; Fountaine v. Railway Co. (1868) L. R. 5 Eq. 316, 321; Bank v. Willan (1874) L. R. 5 P. C. 417, 448; Mahony v. Mining Co., (1875) L. R. 7 H. L. 869, 883, 893, 894, 902; County of Gloucester Bank v. Rudry Merthyr Steam & House Coal Colliery Co. [1895] 1 Ch. 629, 633. The only English decision, cited at the bar, which appears to support the opposite conclusion, is Commercial Bank v. Great Western Railway (1865) 3 Moore, P. C. (N. S.) 295, which, unless it can be distinguished on its peculiar circumstances, is against the general current of authority. See, also, a very able judgment of the court of errors and appeals of New Jersey, delivered by Mr. Justice Depue, in Water Co. v. De Kay, 36 N. J. Eq. 548, 559–567.

In the present case, all natural persons or corporations by whom bonds of the Beattyville Company bearing the guaranty of the Louisville, New Albany & Chicago Railway Company, signed by the proper officers of the company and under its seal, were purchased in good faith, and without notice that there had been no petition of a majority of the stockholders for their execution, had the right to assume that such a petition had been presented, as required by the statute of 1883.

The records of the railroad corporation and of its board of directors, which would naturally show whether such a petition had or had not been filed, were private records, which a purchaser of the bonds was not obliged to inspect, as he would have been if the fact had

been required by law to be entered upon a public record. Brewer, J., in Blair v. Railroad Co. (C. C.) 25 Fed. 684; Water Co. v. De Kay, 36 N. J. Eq. 548, 568; McCormick v. Bank, 165 U. S. 538, 551, 17 Sup. Ct. 433, 41 L. Ed. 817; Irvine v. Bank, 2 App. Cas. 366, 379.

It follows that the decree of the circuit court of appeals, so far as it ordered the bill to be dismissed with regard to the guaranty on the bonds which the Louisville Trust Company and the Louisville Banking Company took in good faith, and without notice of any want of authority to execute the guaranty, was correct.

But, in regard to the guaranty on the bonds which the Louisville Banking Company took with notice that the guaranty had not been authorized by a majority of the stockholders, the decree of the circuit court of appeals needs to be modified. * * *

VI. Rights in Quasi Contract

BARONESS WENLOCK et al. v. RIVER DEE CO.

(Supreme Court of Judicature, Court of Appeal, 1887. L. R. 19 Q. B. Div. 155.)

Application to vary the report of a special referee. The facts were as follows:

An action had been brought by the plaintiffs, as executors of the late Lord Wenlock, deceased, to recover from the defendants the amount of moneys advanced by the testator to them. The defence set up was in substance that the moneys had been borrowed by the company ultra vires. It appeared that the testator had advanced large sums of money to the defendant company. He had also paid off a previous advance of £56,000. from the Rock Insurance Company to the defendants, taking an assignment of that debt and a fresh covenant for repayment to himself by the defendants. The judge at the trial gave judgment for the plaintiffs for the full amount of the advances by the testator to the defendants. Upon appeal the Court of Appeal varied his judgment, and, by order dated May 9, 1883, ordered that judgment should be entered for the plaintiffs for the amount of £25,000. (that sum being the full amount which the company had power to borrow) and interest, and also that in addition thereto the plaintiffs should recover judgment for so much and so much only of the sums advanced as was employed in payment of any debts or liabilities of the company properly payable by them, and interest from the respective dates of such employment, and that it should be referred to a special referee to inquire as to and report the amount of the interest payable on the said sum of £25,000. as aforesaid, and the amount of the parts of the said sums so employed as aforesaid and the interest thereon. On appeal to the House of Lords they affirmed the decision of the Court of Appeal.

10 App. Cas. 354. The special referee held an inquiry under the above order, upon which inquiry counsel were heard and witnesses examined, and he thereupon made a report. The plaintiffs now applied to the Court of Appeal to decide certain questions of law raised by such report and to vary the report in certain respects, and there was a cross application to vary such report by the defendants. Various questions arose on the report with regard to items allowed or disallowed by the referee, which the plaintiffs claimed to have allowed under the order of May 9, 1883, but which the defendants contended should be disallowed.

The questions raised were briefly as follows:

In addition to the portions of the moneys advanced which had been applied to the payment of debts or liabilities of the company existing at the time of the respective advances the referee allowed, subject to the opinion of the Court, items in respect of portions of the moneys advanced which had been applied in payment of debts and liabilities of the company which arose subsequently to the respective advances, whereas the defendants contended that he should have disallowed such items and allowed only items in respect of moneys advanced which had been applied in payment of debts and liabilities existing at the date of the advances. * * *

The plaintiffs further claimed to be entitled to be allowed under the order, in addition to the £25,000. for which they had judgment as being validly borrowed, the amount of all debts and liabilities of the company paid out of that sum of £25,000.[89]

The judgment of the Court (LORD ESHER, M. R., and FRY and LOPES, L. JJ.) was delivered by

FRY, L. J. The questions which now require determination in this case arise from the application of the order of this Court of May 9, 1883, to the facts as found by Mr. Robinson, the special referee named in the order.

By that order it was directed that judgment should be entered for £25,000. and interest, and in addition thereto for so much and so much only of the sums advanced to the defendant company by the Rock Life Assurance Company and Baron Wenlock as was employed in the payment of any debts or liabilities of the defendant company properly payable by them, with interest from the respective dates of such employment. It appears that some of the moneys were applied in payment of debts and liabilities properly payable by the company at the date of the advances, and some in payment of debts and liabilities which arose or became properly payable at dates subsequent to the advances. The defendants contend that only the advances employed in payment of debts and liabilities actually payable at the date of the advance can be brought within the operation of the direction in the order. The plaintiffs contend that all these advances

[89] Statement of facts abridged.

are within the direction, and that the date of the accruer of the liability is immaterial.

We are of opinion that the plaintiffs' contention ought to prevail. We are not at liberty to travel beyond or review the declaration contained in the order of May 9, 1883, which is binding on us not only as a decision of this Court but by reason of its affirmation by the House of Lords: and in our opinion the order rightly bears the wider construction. It is silent as to any limit of time within which the liabilities are to accrue, or within which they are to be paid: and by fixing the respective dates of the employment of the sums as the periods of time from which interest is to run, it seems to indicate that the date of the employment and not of the advance is the material one. If the court had intended any such limitation of the inquiry as that now contended for by the defendants, we think that it would have found expression, if not in the formal order, at any rate in the oral judgments, but we can find no trace of it.

But we go further and say that in our judgment the equity in question knows of no such limitation as that suggested. This equity is based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice. The court closes its eyes to the true facts of the case, viz., an advance as a loan by the quasi-lender to the company, and a payment by the company to its creditors as out of its own moneys, and assumes on the contrary that the quasi-lender and the creditor of the company met together and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit. There is no reason that we can find for supposing that this imaginary transaction between the quasi-lender and the creditor was confined to the day and hour of the advance of the money to the company: in the coffers of the company the money really advanced as a loan is still thought of by the court as the money of the quasi-lender: and the court, as the author of the benevolent fiction on which it acts, can fix its own time and place for the enactment of the supposed bargain between the two parties who have met and contracted together only in the imagination of the court.

The true limit of the doctrine we conceive to be stated by Lord Selborne, L. C., in delivering the judgment of this court in the case of the Blackburn Building Society v. Cunliffe, Brooks & Co., 22 Ch. D. 61, at page 71: "The test," said he, "is, has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet and have

had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and, if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing."

Now, the payment of bona fide liabilities arising or accruing subsequently to the actual date of the advance has in no way really added to the liabilities of the company and therefore in no way transgresses the boundaries of the doctrine as laid down by this Court in the case to which we have referred. Sir Horace Davey forcibly warned us of the danger of the proposition which we have laid down, and said that it would afford to companies a facile means of evading the limit of their borrowing powers. But the danger appears to us imaginary. We do not think that capitalists will be found knowingly and willingly to advance money in the hope of recovering it on the ground of some future subrogation to the future rights of some future creditor. The doctrine has rarely, if ever, done more for any one than snatch a few brands from the burning. In the present case the utmost extension of the doctrine will leave the plaintiffs heavy losers.

The next question arises in this way. Certain creditors of the company were paid by the bankers of the company: these bankers were paid by the advances of the Rock Company or Lord Wenlock: are the plaintiffs entitled to be subrogated to the rights of these creditors? It appears to us that they are entitled to be so subrogated: that the right of the bankers, which they obtained by subrogation from the creditors whom they paid, was an equitable liability of the company: and that for the purposes of this inquiry it is immaterial whether the rights of the creditors accrued before or after the advances by the bankers, or the Rock Company, or Lord Wenlock.

A similar question was discussed as to a Mr. Green, who was a managing director and agent of the company, and to whom payments were made by the company out of which he made disbursements for the company. It was argued that the inquiry must stop at the first payment by the company. But we can find no ground for this contention. To follow the money into a debt or liability of the company does not add to the liabilities of the company, whether that pursuit be through one or more hands and by one or many steps.

It is conceded that under the order of May 9, 1883, the plaintiffs are entitled to the £25,000. and to so much of the sums advanced beyond the £25,000. as was expended in satisfaction of the debts and liabilities of the company. The plaintiffs contend that they are entitled, in addition to all this, to so much of the £25,000. itself as was so expended. They contend that this is given to them by the express terms of the order, and that the point, therefore, is not open to further consideration. We do not so read the order; for it appears to us that the

£25,000. is dealt with separately, in the first place, and that the rest of the order deals with sums in every respect outside of and beyond the £25,000. The words in the order "in addition" exclude, in our opinion, all further consideration both of the borrowing of the £25,000. and of its application. And in our opinion this is right in point of reason and principle; for the £25,000. having been validly borrowed became part of the moneys of the company as much as the original subscriptions of the members or the produce of sales of its lands; and no application by the company of its own moneys to the payment of its own debts can be conceived of as a transaction between a quasi-lender to the company and the creditors of the company, or lead to a subrogation of the creditors' rights to the stranger. If the plaintiffs were to be subrogated to the rights of those creditors who were paid with the £25,000., we do not see why they should not be subrogated to the rights of every creditor paid by the company with its own moneys from any source whatever.

The matter must be referred back to the referee with the following declarations and the costs of the hearing which has led to partial success and failure on each side, must be costs in the cause.

Judgment accordingly.[90]

In re WREXHAM, MOLD & CONNAH'S QUAY RY. CO.

(Supreme Court of Judicature, 1899. L. R. 1 Ch. 440.)

The above railway company had power to borrow money by the creation of three classes of debenture stock, A, B, and C, to the extent of £175,000. by A stock, £175,000. by B stock, and £145,000. by C stock. The A stock had priority as to both principal and interest over the B and C stocks, and the B stock had a similar priority over the C stock. In July, 1897, these borrowing powers were exhausted, the whole of the three classes of debenture stock having been created, and the company had no further power to borrow money. The company had not any funds to enable them to pay the half-year's interest which was about to become due on August 1 on the debenture stocks, and they applied to their bankers, the North and South Wales Bank, to advance them money for the purpose. This the bank consented to do, and the advance was made by their paying the interest-warrants to the stockholders when they presented them for payment. The total sum thus applied was £9,672., of which £3,850. went to pay the interest due to the holders of A debenture stock, £3,380. to pay the interest on the B stock, and the residue to pay the interest on the C stock.

On September 8, 1897, upon a petition under the Railway Companies Act, 1867, presented by the Great Central Railway Company, who were judgment creditors of the Wrexham Company, an order

[90] Compare In re National, etc., Building Society, L. R. 5 Ch. App. 309 (1869).

for the appointment of a receiver was made against that company. The receiver had in his hands enough money to pay a half-year's interest to the A stockholders and to leave some surplus for the B stockholders. The bank claimed, in the first instance, that, to the extent of the whole £9,672. which they had paid to the debenture stockholders, they should be subrogated to the rights of those stockholders, and should, out of any moneys in the hands of the receiver, be paid what they had advanced in priority to any payment to the debenture stockholders. Romer, J., held that this claim was unfounded. The bank then claimed that, at any rate to the extent of the £3,850. paid to the A stockholders, they were entitled to stand in the shoes of those stockholders and to be paid in priority to any payment to the B and C stockholders out of any surplus remaining after paying the interest due to the A stockholders. Romer, J., decided against this claim also. The bank appealed against both decisions.

LINDLEY, M. R. Agreeing as I do with Romer, J., and with the judgments which my brothers have prepared, and which I have read, I should say nothing more, if it were not that I think I ought to express my dissent from the observations of Fry, L. J., on which the appellants base their contention. The decision of the Court in Baroness Wenlock v. River Dee Co., 19 Q. B. D. 155, was quite right, and the judgment in it is very valuable. Fry, L. J., who delivered it, was the last person to shut his eyes and not get at the real facts and substance of any case before him. But in dealing with that case he says (19 Q. B. D. 165) that "the Court closes its eyes to the true facts of the case." I cannot help thinking that this is incorrect. A prohibition against borrowing more than a given sum is only in reality and substance disobeyed when an obligation to pay more than that sum is contracted. Courts of Equity have always looked into the facts to see whether the prohibition has been really disobeyed or not. If it is disobeyed, and to the extent to which it is disobeyed, the prohibition is enforced. But, if the facts when ascertained show that in truth it has not been disobeyed, an advance of money is treated as not prohibited, although it may at first sight appear to be so because it is beyond the limited amount. The application of the money borrowed shows whether the obligations of the borrowing company have been increased or not, and the extent, if any, to which they have been increased. So far as the money has been applied in discharging debts or liabilities which could be enforced against the company, the prohibition against borrowing does not apply to it, and the Courts have so decided.

The subrogation theory has been had recourse to in order to account for the decisions ultimately arrived at; but that theory was really not wanted in order to justify them. It was, however, adequate for the purposes for which it was used, and as applied to the cases before the Courts it led to just results. But, if logically followed out in other cases, it leads to consequences not only not foreseen by those

who had recourse to it, but to results so startling that I cannot accept the theory as sound. There is no decision yet in which it has been applied so as to defeat any innocent person, nor so as to place the lender in a better position than that in which he would have been if his loan had not been prohibited. But that would be the result in the present case, if we adopted that theory and pushed it to its logical consequences, as the appellants contended we ought to do. The Legislature (30 & 31 Vict. c. 127, § 26) has recognised and partially acted upon the true principle in enacting that money borrowed by a company for the purpose of paying off, and duly applied in paying off, existing statutory mortgages or bonds of the company shall, so far as the same is so applied, be deemed money borrowed within, and not in excess of, the company's statutory powers. This principle obviously cannot in reason be confined to statutory bonds or mortgages; and Courts of Equity have acted upon the principle, and have not confined its application within arbitrary limits, but have enforced it more widely than the Legislature, in order to prevent great injustice. They have done so, however, not by closing their eyes to the real facts and acting on a fiction, but by diligently ascertaining the real truth, and by attending to the real substance of each case. Even if the fiction of subrogation were correct, the maxim "In fictione juris semper existit æquitas" would prevent its application to the present case.

RIGBY, L. J.[91] * * * I think that the great preponderance of authority shews that the doctrine of subrogation has very little, if anything at all, to do with the equity really enforced in the cases, and that there is, at any rate, no authority for any subrogation to the securities or priorities of the creditors paid off. Dealing with this case independently of the authorities, I see no reason why the parties to an illegal lending should have anything more than bare justice dealt out to them; and this they get if they are allowed, as they have hitherto been allowed, to have that portion of the advance actually expended in payment of debts of the company treated as a valid advance. If the advance had been within the borrowing powers of the company, the bank could have had no right to the securities or priorities of the creditors paid off. It seems to me that it would be unjust to other creditors that a fiction should be invented for the purpose of making an invalid loan more valuable than a valid one. I entirely agree with what Romer, J., said about the unsatisfactory way in which such a doctrine as is contended for by the appellants would work in practice, and I do not consider it necessary to repeat it.

VAUGHN WILLIAMS, L. J.[92] (after stating the facts). Generally speaking, if a company, which has exhausted its borrowing powers, purports to borrow further money, and thus obtains a supply of money, the loan so contracted is void and ultra vires, and the lender has no

[91] A part of the opinion is omitted.
[92] A part of the opinion is omitted.

right of action against the company; but, nevertheless, in some cases, the person supplying the money is able to obtain recoupment from the funds of the company, and the question to be determined in such a case may be stated generally to be, what is the principle upon which the person supplying the money is entitled to recoupment as against the company, and what is his relation in regard to priority to the various classes of creditors of the company? Now, there seem to me to be two principles upon which the right of recoupment may be enforced by the person supplying the money against the company which has exceeded its borrowing powers. The one principle is, that, although the borrowing power is exhausted, and the transaction which purported to be a loan to the company is as such ultra vires, and therefore null and void, so that the would-be lender can neither enforce repayment of the loan nor rely upon the securities which he has taken for the loan, yet, if the company apply the money in their hands to the payment of debts actually owing by them, there is thereupon a new transaction between the company and the person who has paid the money for the purpose of the ultra vires loan. * * *

NORTHWESTERN UNION PACKET CO. v. SHAW.

(Supreme Court of Wisconsin, 1875. 37 Wis. 655, 19 Am. Rep. 781.)

Action by the Northwestern Union Packet Company, a corporation organized to engage in the business of a common carrier on the Mississippi river and its tributaries, against Shaw to recover for the breach of a contract. Shaw agreed to sell 4,000 bushels of wheat to the Packet Company, to be delivered into the barge of the latter company at Shaw's mill. The Packet Company alleges that it has paid $1,000 on account of the contract, and furnished the barge, but that Shaw failed to deliver the wheat or to repay the $1,000 so advanced to him. The Packet Company asks judgment for the $1,000 paid on account of the contract; a specific sum as damages for breach of the contract; a specific sum for the value of the use of the barge while so detained. The trial court held that the Packet Company had no power to make the contract and directed a verdict for Shaw, on which judgment was entered. Appeal from this ruling.[93]

LYON, J.[94] [After sustaining the ruling of the trial court, that the contract is ultra vires, the Court proceeds:]

But the questions remains whether the plaintiff is entitled to recover the $1,000. If it can recover it, no good reason is perceived why it may not do so in this action. The complaint states all the facts essential to be averred in an action to recover the same, except that the

[93] Statement of facts substituted. [94] A part of the opinion is omitted.

plaintiff had no power to make the contract, and that omission may be supplied by amendment. Such an amendment cannot prejudice the defendant, for, in the progress of the case thus far, he has constantly asserted such want of power as a defence.

An extended discussion of the question will not be profitable. There are many adjudications in this country and in England, bearing upon it, some of which are cited in the brief of counsel for the plaintiff. The cases have been carefully examined, and we think the rule may fairly be deduced from them, that when money has been paid upon an executory agreement, which is free from moral turpitude, and is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto, otherwise capable of contracting, to enter into that particular agreement, or for want of compliance with some formal requirement of the law (as that the contract shall be in writing, and the like), the money so paid may, while the agreement remains executory, be recovered back by the party paying it, in an action for money had and received.

Many of the cases go farther, and sustain the action when some of the foregoing conditions are wanting. But the exigencies of this case do not require us to determine how far the rule may be extended, or what conditions may be omitted therefrom without defeating the action. The rule is here stated most favorably for the defendant; and yet it is clear that under it the plaintiff may maintain an action to recover the money paid on the invalid agreement. A contract to buy wheat is an innocent one; no statute has prohibited it; and this particular agreement is invalid only because of the accident, that the purchaser is a corporation instead of a natural person, and happens to lack authority to make this particular contract.

In addition to the cases on this subject cited by counsel, the following will be found to sustain the views above expressed: Bagott v. Orr, 2 Bos. & Pul. 472; Lowry v. Bourdieu, Doug. 468; Aubert v. Walsh, 3 Taunt. 277; Busk v. Walsh, 4 Taunt. 290. In Thomas v. Sowards 25 Wis. 631, the rule above stated was applied. See also Brandeis v. Neustadtl, 13 Wis. 142. But it is argued by the learned counsel for the defendant, that the case of M. W. & M. P. R. Co. v. W. & P. P. R. Co., 7 Wis. 59, is an authority fatal to the plaintiff's right to recover. That was a mortgage given to secure the performance of an agreement which the court held to be ultra vires. It was, as Chief Justice Whiton said in the opinion, an action founded on the agreement and on it alone. The contract failing, the action failed as a matter of course. In strict obedience to the authority of that decision, we hold in this case, that so far as the action is founded on the void agreement, it cannot be maintained. Had that been simply an action to recover the amount paid by the plaintiff for the use of the defendant, it might have been decided differently. But it was not such an action, and the court did not determine whether such an action could be maintained. The case is not, therefore, an authority against the

plaintiff's right to recover his advances on account of the void executory agreement.[95]

BY THE COURT. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

A motion for rehearing was denied.

PULLMAN'S PALACE CAR CO. v. CENTRAL TRANSP. CO.

(Supreme Court of the United States, 1898. 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108.)

Bill in Equity by the Pullman Company against the Central Company, praying that the latter company be enjoined from bringing more suits against the Pullman Company for rent under a lease by the terms of which the Central Company in 1870 leased to the Pullman Company its entire plant, and personal property, together with its contracts which it had with railroad companies for the use of its sleeping cars on their roads, also patents belonging to it, for the term of ninety-nine years. In consideration of these various obligations the Pullman Company agreed to pay an annual rental. The rent was paid until 1885, when the Pullman Company repudiated the lease, since which date the Central Company has brought several actions for installments of rent. The present bill was filed to enjoin further actions of this kind, and for the adjustment of the rights of the parties with respect to the property of the Central Company in possession of the Pullman Company under the lease.

After the bill was filed, the Supreme Court in the case of Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, decided the lease was ultra vires and void. Thereupon the Pullman Company moved the dismissal of this bill. The Central Company opposed the motion, and filed a cross bill asking for an accounting and relief.

The trial court refused to dismiss the bill, allowed the cross bill, and on a report of a master awarded the Central Company the sum of $4,235,044. Appeal.[96]

PECKHAM, J.[97] * * * This brings us to a discussion of the principles upon which a recovery in this case should be founded. The so-called "lease" mentioned in this case has been already pronounced illegal and void by this court. 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. The contract or lease was held to be unlawful and

[95] Accord: Day v. Spiral Springs Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352 (1885), semble.

Contra: Grand Lodge v. Waddill, 36 Ala. 313 (1860); Chewacla Lime Works v. Dismukes et al., 87 Ala. 344, 6 South. 122, 5 L. R. A. 100 (1888), semble.

[96] Statement of facts substituted.

[97] A part of the opinion, dealing with questions of practice and measure of recovery, is omitted.

void, because it was beyond the powers conferred upon the Central Company by the legislature, and because it involved an abandonment by that company of its duty to the public. It was added that there was strong ground also for holding that the contract between the parties was void because in unreasonable restraint of trade, and therefore contrary to public policy. In making the lease, the lessor was certainly as much in fault as the lessee. It was argued on the part of the Central Company that even if the contract sued on were void, yet that having been fully performed on the part of the lessor, and the benefits of it received by the lessee for the period covered by the declaration in that case, the defendant should be estopped from setting up the invalidity of the contract as a defense to the action to recover compensation for that period. But it was answered that this argument, though sustained by the decisions in some of the states, finds no support in the judgments of this court, and cases in this court were cited in which such recoveries were denied.

It is true that courts in different states have allowed a recovery in such cases, among the latest of which is the case of Gaslight Co. v. Claffy, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664, where Chief Judge Andrews, of the court of appeals, examines the various cases; and that court concurred with him in permitting a recovery of rent upon a void lease where the lessee had enjoyed the benefits of the possession of the property of the lessor during the time for which the recovery of rent was sought.

But in the case of this lease, now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease. It was said (page 60 of the report in 139 U. S., and page 488, 11 Sup. Ct. [35 L. Ed. 55]): "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm, the unlawful contract." And the opinion of the court ended with the statement that "whether this plaintiff could maintain any action against this defendant, in the nature of a quantum meruit or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract,

and which, for the reasons and upon the authorities above stated, the defendant was not liable for."

The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over 100 years old. It was said by Lord Mansfield, in Holman v. Johnson (decided in 1775) 1 Cowp. 341, that "the objection that a contract is immoral or illegal, as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute concerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of the cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, already cited. The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine as applied to particular facts, we refer in the margin to a few of the multitude of cases upon the subject.

They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed.[98] * * *

Judgment appealed from reversed.

Mr. Justice HARLAN dissented. Mr. Justice WHITE dissented, on the ground that the judgment appealed from was the correct amount, and should not be reduced.

[98] See Brunswick Gas Co. v. United Gas Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385 (1893).

VII. Torts

CHESTNUT HILL & SPRING HOUSE TURNPIKE CO. v. RUTTER.

(Supreme Court of Pennsylvania, 1818. 4 Serg. & R. 6, 8 Am. Dec. 675.)

This was an action of trespass on the case, in the common pleas of Montgomery county, for stopping a water course.

The declaration stated that the defendants below, the plaintiffs in error, were incorporated by an act of assembly, passed on the 5th day of March, 1804, entitled "An act to enable the Governor of this Commonwealth to incorporate a company to make an artificial road, from the top of Chestnut Hill, through Flourtown, to the Spring House tavern, in Montgomery county"; that the plaintiff was seised of a messuage, tanyard, and tract of land, through which a rivulet from time immemorial, had flowed, etc.: and that the defendants contriving, and wrongfully, and injuriously intending to injure the said plaintiff, and to deprive him of the benefit of working and tanning leather, in the said tanyard, and of the profit that might accrue therefrom, did wrongfully and unjustly erect and set up, certain jetties or piers on each side of the said rivulet, by reason whereof the said rivulet was thrown back, and overflowed the said tanyard, and destroyed a great quantity of hides, etc.

By the 9th section of the act of incorporation (Pamph. L. 215) the company had power "to erect permanent bridges over all the waters crossing the said road."

The jury found a verdict in favor of the plaintiff, for $305.

The errors now assigned were: 1. That the Court below, permitted an action to be maintained against a body corporate for a tort. 2. That the declaration, if such an action could be maintained, set forth no cause of action.

E. Ingersoll and Ingersoll, for the plaintiffs in error.

A recurrence to the history of actions will show that, as early as the time of Bracton, a distinction existed between those which arose ex contractu, and those which arose ex delicto. Anciently the action of debt was almost the only remedy for the recovery of money. Trespass was confined to cases of force. In the times of Edward I debt was the form of action in which money was recovered, whether due on parol contracts or by specialty; specific chattels in detinue, while trespass was restricted to cases of direct and immediate injury to person or property. In the reign of Edward III debt continued to be the usual remedy for the recovery of money on most contracts, but actions of account, annuity, and covenant, were also in use. Trespass became in this reign more general, but was usually confined to the

redress of injuries to the person, as by battery or assault, and to property, as by taking goods and entering into houses and lands; it was never held, however, to extend to corporate bodies. About the middle of the reign of Edward III, the statute of Westminster 2d authorized writs to be framed in consimili casu, under which the action of trespass was greatly enlarged in its scope, and so modified as to be adapted to every man's own case. The first action of this description occurred in the 22d year of this reign, and was brought against a man who undertook to convey the plaintiff's horse across the Humber, and so overloaded his boat that the horse was lost. During the reigns of Richard II, Henry IV, and Henry V actions on the case became very frequent. In the time of Henry IV the term trespass on the case, was in familiar use. Before that period, this action, though applied to cases of consequential damage, was called an action of trespass simply. Its nature and character were then better understood, and the distinction between trespass and trespass on the case, was marked by a more nice discrimination. Whether it could be maintained on an executory promise, was much discussed at this time; it was however discountenanced, and did not receive the sanction of the Judges until the reign of Henry VII. Reeve's History of English Law. Part i. 230. Part. ii. 28, 36, 158, 179, 182, 297, 346. Part ii. 22 Hen. VII.

It was never, however, pretended, that an action of trespass vi et armis, would lie against a corporation, which, from its nature, is incapable of committing a tort; nor can the same thing in effect be done, by changing the form of action, and calling it an action on the case. Corporations can no more be guilty of torts than executors; the analogy between them, in this respect, is strong, and it has been decided, that trover does not lie against an executor for a conversion by his testator. Hambly v. Trott, Comp. 372. Indeed, it was once doubted, whether assumpsit would lie against a corporate body, because it could make no promise without affixing its seal, and the Supreme Court of this state, went so far on one occasion as to decide, that it would not. Breckbill v. Turnpike Company, 3 Dall. 496, 1 L. Ed. 694. The remedy for a tort is not against the corporation, but against the individual who commits it, who may have his action over against those who employed him. The relation of master and servant, as it exists between individuals, does not hold between corporations and those who act under their orders. Kyd on Corp. 223, 260, 450. If the servant of a corporation commit an assault and battery, it will not be pretended, that the corporation is responsible. If it be not responsible for an assault and battery committed by its servant, the relation of master and servant does not exist; because nothing is more clear than that a master is responsible for the torts of his servant, committed in the course of his master's business. How can a distinction be drawn between an assault and battery, and in-

juries of the nature of that complained of in this suit? It is impossible to say where the line should be placed.

Corporations are the creatures of the law, of a highly refined and intangible nature, whose properties and attributes, lawyers alone can understand. Deriving their existence from the law, they must be governed by the terms of the law which creates them. They must proceed and be pursued in the path prescribed by the law. If the corporators do an act, beyond their corporate powers, they, as individuals, and not the corporation of which they are members, must answer it. If the corporation itself enter into a contract not authorized by its charter, no action founded on the contract can be sustained, though the individual members may be sued. Suppose an insurance company should undertake to make a turnpike road, or to build a church, could those who were employed by them, recover against the corporation as such? Every principle of the law of corporations forbids it. Now, a corporation never was and never can be authorized by law to commit a tort; they can invest no one with power for that purpose. If, therefore, an agent constituted for a legal purpose, inflict an injury, the corporation is no more answerable, than it would be for an act of that agent, done without any authority whatever derived from it, because being unauthorized to commit a wrong, it is out of the scope of its corporate powers. The act of the law, like the act of God, can work a wrong to no one, and if a man sustain damage by it, it is damnum absque injuria. The plaintiff in this case, therefore, must look to the individual from whose acts he sustained an injury, who never was, and never could be authorized to commit a tort. The principle that a body corporate can only act in strict pursuance of the objects of its incorporation, is stated and exemplified in the conclusion of the Lord Chancellor's opinion, in the case of Child v. Hudson's Bay Company, 2 P. Wms. 209. It is also established by the cases of Beatty v. Marine Insurance Company, 2 Johns. (N. Y.) 114, 3 Am. Dec. 401, Head v. Providence Insurance Company, 2 Cranch, 166, 2 L. Ed. 229, Steele v. President, etc., of Lock Navigation, 2 Johns. (N. Y.) 283, and McClenachan v. Curwen, 6 Bin. (Pa.) 509.

Between nonfeasance and malfeasance, a marked distinction exists. It is not denied, that for nonfeasance, actions of trespass on the case have been sustained, as in the case of the Mayor of Lynn (in error) v. Turner, Cowp. 86, where the action was against the corporation of Lynn Regis, for neglect of duty, in not keeping a creek in repair; in the case of Townsend v. Susquehannah Company, 6 Johns. (N. Y.) 90, for neglecting to repair a bridge, and in several similar cases. Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Stevens v. Middlesex Canal, 12 Mass. 466. In Riddle v. Proprietor of Locks and Canals on the Merrimac, 7 Mass. 169, 5 Am. Dec. 35, Parsons, C. J., lays down the law more broadly than by his authorities he is

warranted in doing; yet he does not go so far as to assert the general proposition, that trespass will lie against a corporation. He merely says, that in certain cases, trespass may be maintained; and it is to be observed, that the action in which the opinion was delivered, was for a nonfeasance; a neglect of a corporate duty in not keeping the canal in order.

On recurring to ancient authorities, it will appear, that trespass against a corporation for a tort, has never been sustained. Thorpe, J., in the Book of Assizes, 22 Edw. III, p. 100, expressly says, that trespass never lies against a corporation. A corporation and an individual cannot be joined in trespass as defendants. 8 H. VI, 1. pl. 2. A corporation cannot commit a disseisin except for its own use. Mich. 8 H. VI, pl. 34. p. 14. Mich. 9. H. VI, pl. 9. p. 36. Hil. 22. H. VI, pl. 36. p. 46. Trespass does not lie against a corporation in its corporate name. Vin. Corp. pl. 15. p. 300. Nor will an attachment lie. Id. B. A. pl. 3. p. 311. Nor replevin. Id. X. pl. 17. p. 308. In trespass against an abbot he shall be named by his name of baptism. Id. Q. pl. 9. p. 300. An action for a false return to a mandamus, must be against the individual members of the corporation. Id. Q. pl. 50. p. 303. A corporation cannot beat or be beaten. Id. Z. pl. 2. p. 309. If a corporation disseise, it is in their natural and not in their corporate capacity. Bac. Ab. Corp. E. pl. 5. Trespass does not lie against a corporation. Com. Dig. Plead. 2. B. p. 196. * * *

Binney, for the defendant in error.

This case presents three questions. 1. Whether a corporation can commit a tort? 2. Whether, if it can, this is the proper form of action? 3. Whether the cause of action is well set forth?

It must now be taken as proved, that the company gave authority to their servants to do the act complained of. The rule between corporations and their servants is substantially the same, as between individuals and their servants. If, therefore, they gave their servants power to do an act in pursuance of their corporate character, and they do it improperly, the corporation are responsible in the same manner as any other master. Why should a difference exist, and why should a corporate body be protected in the commission of wrong? If a corporation be the intangible being it is asserted to be, a greater and more mischievous monster cannot be imagined. According to the doctrine contended for, if they do an act within the scope of their corporate powers, it is legal, and they are not answerable for the consequences. If the act be not within the range of their legitimate powers, they had no right by law to do it; it was not one of the objects for which they were incorporated, and, therefore, it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any Court of justice. This master is responsible for the acts of the servant, not because he has given him an authority to do an illegal act, but from the relation subsisting between

them. If the servant exceed the power he has received, the master must answer it. So if the company give their servant authority to make a road, in pursuance of their power to do so, and he exceeds that authority, they are answerable, because he is their servant.

The rule which makes the master responsible for the acts of the servant, is declared by Sedgwick, J., in delivering the opinion of the Court, in the case of Gray v. Portland Bank, 3 Mass. 385, 3 Am. Dec. 156, to apply with peculiar force to corporations and their agents. The position that a corporation can do no wrong, is pernicious in its consequences, and unfounded in law. If I put a note in bank, and wish to get it out, to put it in suit, and the bank refuse to deliver it, surely the remedy is an action of trover. If I refuse an exorbitant toll, in consequence of which, my horse is taken from me, and I cannot get him from the toll gatherer, can it be doubted, that I may have an action of trover against the company? If I cannot look to the company there is no remedy, because the toll gatherer may be worth nothing, or may have gone off; nor can the individual members be resorted to, unless, they were guilty of malice. If a quagmire or any other nuisance exist, the supervisors where there is no turnpike company may be indicted; and where a company are invested with the duties of supervisors they may be indicted. The corporators as individuals cannot be indicted, because it is not within the line of their duty as such.

As to the form of action, it is difficult to point out any other remedy for injuries of this description than trespass on the case, and if there be no other remedy, this is the right one. Assumpsit certainly would not lie, because there was no contract; nor would trespass, vi et armis, because the damage was consequential. The old authorities which have been referred to, belong to a period, when the English lawyers were more distinguished for subtlety than for sound sense; and when the nature of corporations was greatly refined upon. It appears, however, from 2 Inst. 697, 703, that a corporation was then considered as substantially an inhabitant or occupier; and subsequently in Rex v. Gardener, Cowp. 79, it was held, that a corporation seised of land for their own profit in fee, are within the statute of 43 El. c. 2, inhabitants or occupiers of such lands, and liable in respect thereof, to be rated in their corporate capacity to the poor. In the Supreme Court of the United States, it has been decided, that a corporation may sue in the Circuit Court of the United States as a citizen. Bank of the United States v. Deveau, 5 Cranch, 65, 3 L. Ed. 38. The law on the subject of corporations, has of late been greatly and beneficially altered. It was formerly held, that they could do nothing except under their seal, and for that reason assumpsit would not lie against them. All these niceties, however, are now repudiated, and they may enter into contracts either express or implied, without seal. When a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are ex-

press promises by the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, on which an action lies. Bank of Columbia v. Patterson's Administrators, 7 Cranch, 299, 3 L. Ed. 351.

The opinion of Thorpe, J., which is much relied on, was nothing more than a dictum, and was grounded upon the necessity which then existed of a capiatur pro fine and exigent, which could not be entered against a corporation. These, however, are now exploded, and giving to the assertion of Thorpe, all the weight to which it can possibly be entitled, the authority must fail, because the reason of it no longer exists. The distinction taken between a misfeasance and a nonfeasance is altogether ideal; it has no solid foundation. The authorities all show, that the action will lie in either case. If a company be guilty of a tort by neglecting a road or bridge, how can they be reached but in this form of action? That this is the proper form, is proved by the cases adduced on the opposite side. Mayor of Lynn v. Turner, was clearly an action of trespass on the case, for a tort; so was Townsend v. Susquehannah Turnpike Company and Riddle v. Proprietors of Locks, etc., on Merrimack. In two of these cases the point was not made, and in the third it was overruled. As respects the form of action, there is no difference between nonfeasance and misfeasance; trespass on the case, is the general form.

We are, therefore brought back to the point from which we set out, whether a corporation can commit a misfeasance, which is clearly proved, not only by the late, but by the ancient authorities, and even by some of those which have been cited for the plaintiffs in error. Trespass against the Mayor and Commonalty of York; plea that all the inhabitants had right of common, in the place where the trespass, &c.; not good, because the action is against the corporation, and the plea is a justification as to individuals. Plea altered, and the corporation said to be aiding in the trespass; adjudged that they cannot be aiding, nor can they give a warrant to commit a trespass without writing. 4 H. VII, pl. 11. p. 13. A corporation cannot authorize a wrong to be committed, except by writing under their common seal. Brook. Corp. pl. 34. p. 189. These authorities prove the capacity of a corporate body to commit a wrong, and show the position said to have been laid down by Thorpe, to be erroneous. Trespass against the Mayor, Bailiffs, and Commonalty of Ipswich, and one Jabez. Objection was taken, that a corporation and an individual cannot be joined in one writ, but no objection taken, to trespass having been brought against a corporation. 8 H. VI, pl. 2, p. 1. Id. pl. 34. p. 14. An assize of novel disseisin was maintained against the mayor and commonalty of Winton. Libb. Ass. 31. Ass. pl. 19. In trespass against a corporation, if defendant plead a misnomer, plaintiff may reply, known by one name or the other. 6 Vin. pl. 42. p. 303. The result of these authorities is, that even in ancient times, trespass could be sustained against a body corporate. * * *

TILGHMAN, C. J.[1] This is an action on the case, brought by James Rutter against the Chestnut Hill & Spring House Turnpike Company, for an injury done to the plaintiff's land and tanyard, in consequence of certain piers erected by the defendants, on each side of a stream of water, by which the stream was obstructed and thrown back, and overflowed the plaintiff's land.

The defendants below, who are plaintiffs in error, rely on two objections. 1. That a corporation is not suable in this kind of action. 2. That the declaration does not state a good cause of action, even if the defendants were liable to an action in this form.

1. Corporations have lately been so multiplied in the United States, that they stand a very prominent part in the business of the country. It has, therefore, been necessary to consider, with great attention, their nature and their rights, both as to suing and being sued. And as it would be extremely inconvenient that they should do wrong without being amenable to justice, the inclination of the Court has been to hold them responsible. There was a time, when it seems to have been supposed, that they could make no contract but by writing under their common seal. The reason assigned was, that being incorporeal, and consequently incapable of speaking, it was impossible that they should enter into a parol contract. But upon reflection, this reason has been thought insufficient; for, if pursued to its full extent, it would prove that a corporation could not act at all. It has no hand to affix a seal, and must therefore employ an agent for the purpose. But this agent must receive his authority previous to his affixing the seal. It is necessary, therefore, that the corporation should have the power to act without seal, so far as respects the appointment of a person to affix the seal. Now, if it can appoint an agent without seal, for one purpose, there is no reason why it may not for another.

Accordingly in the case of The King v. Biggs, 3 P. Wms. 419, on a special verdict in a case of capital felony, it was held, that the Bank of England might, without seal, authorize a person to sign notes in its behalf. And it was decided by the Supreme Court of the United States, in the case of Bank of Columbia v. Patterson's Administrators, 7 Cranch, 299, 3 L. Ed. 351, that a corporation may, without seal, enter into a contract, express or even implied. In the words of Judge Story, by whom the opinion of the Court was delivered, "When a corporation is acting within the scope of the legitimate purpose of its institution all parol contracts made by its authorized agents are express promises of the corporation, and all duties imposed on them by law and all benefits conferred at their request, raise implied promises, for which an action lies." By this decision, I consider the law as settled. It does, indeed, seem to have been the opinion of this Court, in the case of Breckbill v. Lancaster Turnpike Company, 3 Dall. 496, 1 L. Ed. 694, that an action of assumpsit would not lie against a cor-

[1] A part of the opinion is omitted.

poration. But the law had not been at that time fully considered, and I may say that our late brother Yeates, who was on the bench when Breckbill v. Lancaster Turnpike Company was decided, was satisfied as to the propriety of acquiescing in the authority of Bank of Columbia v. Patterson's Administrators.

But it is objected that the present action is not on contract but on tort, and a very refined argument is brought forward, to prove that a corporation cannot be guilty of a tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorized by its charter. But the charter does not authorize it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company may do great injury, by means of laborers who have no property to answer the damages recovered against them. It is much more reasonable to say, that when a corporation is authorized by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible, in the same manner that an individual is responsible for the actions of his servants, touching his business. The act of the agent is the act of the principal. There is no solid ground for a distinction between contracts and torts. Indeed, with respect to torts, the opinion of the courts seem to have been more uniform than with respect to contracts. For it may be shown, that from the earliest times to the present, corporations have been held liable for torts.

Many cases have been cited from the Year Books. Upon examination, they do not all answer the citations, but enough appears to show that the law was so understood. In 4 Hen. VII, p. 13, pl. 11, we find an action of trespass against the Mayor and Commonalty of York. Plea, that all the inhabitants had a right of common in the land where the trespass is supposed to have been committed: held, not good, because the action is against the corporation, and the plea is a justification as to individuals. In a subsequent part of this case, it is said that a corporation cannot give a warrant to commit a trespass without writing. This, if it be law, proves that a warrant may be given by writing, which is sufficient for the plaintiff's purpose, the point being, whether a corporation can commit a trespass. In 8 Hen. VI, p. 1, pl. 11, and p. 14, pl. 34, trespass was brought against the Mayor and Bailiffs, and Commonalty of Ipswich, and one J. Jabez. It was objected, that a corporation and an individual cannot be joined in one action; but it was not objected that trespass does not lie against a corporation; and the objection is said to have been overruled in 14 Hen. VIII, 2. In the book of Assizes (31 Ass. pl. 19), it appears that an assize of novel disseisin was maintained against the Mayor and Commonalty of Winton. Brook lays it down, that if the mayor and commonalty disseise one who releases to several individuals of the corporation, this will not serve the mayor and commonalty, because

the disseisin is in their corporate capacity. In the old books of entries are numerous precedents of writs of quare impedit against corporations, and in Vidian's Ent. 1, is a declaration in an action on the case (16 Car. II) against the Mayor and Commonalty of the city of Canterbury, for a false return to a mandamus.

To come to more modern times, it was held in the Mayor of Lynn, etc. (in error) v. Turner, Cowp. 86, that an action on the case lies against a corporation for not cleansing and keeping in repair a stream of navigable water, which it was bound to do by prescription, in consequence of which the plaintiff was injured. This was in the year 1774, a little before our Revolution. The laws of the Commonwealth forbid my tracing this point through the English courts, since the Revolution, but we shall find abundant authority in the courts of our own country. In Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156, it is laid down, that the bank was responsible for wrongs done by itself or its agents. In Riddle v. Proprietors of the Locks, &c. on Merrimack River, 7 Mass. 169, 5 Am. Dec. 35, an action was maintained against the company for damage suffered by the plaintiff in consequence of the locks not being kept in repair. And in Townsend v. Susquehanna Turnpike Company, 6 Johns. (N. Y.) 91, an action was supported for the loss of a horse killed by the falling of a bridge, which the company had built of bad materials. These authorities put it beyond doubt that the form of action, in the present case, is good.
* * *

Judgment affirmed.[2]

BISSELL v. MICHIGAN SOUTHERN & N. I. RY. COS.

(Court of Appeals of New York, 1860. 22 N. Y. 258.)

See, supra, p. 285, for a report of the case.[3]

[2] Compare Mills v. Hawker et al., L. R. 9 Exch. Cas. 309 (1874); Poulton v. London Southwestern Ry. Co., L. R. 2 Q. B. Cas. 534 (1867).
Accord: Hutchinson v. Western Atlantic Railroad Co., 6 Heisk. (Tenn.) 634 (1871); Eastern Counties Railway Co. v. Broom, 6 Exch. Rep. 314 (1851).

[3] In Nims v. Mt. Hermon Boys' School, 160 Mass. 177, at 180, 35 N. E. 776, at 778, 22 L. R. A. 364, 39 Am. St. Rep. 467 (1893), where the plaintiff was suing for injury sustained while a passenger on a ferry operated by a charitable corporation, ultra vires, the court, through Knowlton, J., said: "In the present case we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts, and do anything else incidental to the maintenance of the school. Doubtless some of its officers or agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was ultra vires, but its acts in that respect were not different in kind from the ordinary acts of corporations in excess of the power given them by their charter. We are of opinion, therefore, that if the defendant while running the ferry-boat accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across

GOODSPEED v. EAST HADDAM BANK.

(Supreme Court of Errors of Connecticut, 1853. 22 Conn. 530, 58 Am. Dec. 439.)

CHURCH, C. J.[4] This action is based upon the provisions of our statute, entitled "An act to prevent vexatious suits," and is subject to the same general principles as are actions on the case for malicious prosecutions, at common law.

The plaintiff alleges, that the defendants, the East Haddam Bank, a body politic and corporate, without probable cause, and with a malicious intent unjustly to vex, harass, embarrass, and trouble the plaintiff, commenced by a writ of attachment, and prosecuted against him, a certain vexatious suit or action for fraudulent representations, to the injury of said bank, and which action resulted in a verdict and judgment against the bank, and in favor of the present plaintiff.

On the trial of this cause, by the Superior Court, the defendants moved for a nonsuit, on the ground that the plaintiff by his evidence had failed to make out a prima facie case; which motion the court granted, and judgment of nonsuit was entered against the plaintiff, which he now moves to set aside.

The judgment of the Superior Court, in granting the nonsuit, as we understand, was founded solely upon the ground that a corporation aggregate was not, by law, liable for such a cause of action as was set up by the plaintiff, in his declaration,—at least, no other ground of nonsuit or objection to the plaintiff's action had been argued before us. And, therefore, irrespective of the evidence detailed in the motion, we confine ourselves to what we suppose to be the sole question in the case.

We assume that the plaintiff has sustained the damage he claims, by reason of the prosecution of the vexatious suit, and the question is, has he a legal remedy against the bank?

The claim of the defendants is, that the remedy for this injury is to be sought against the directors of the bank, or the individuals, whoever they might have been, by whose agency the vexatious suit was prosecuted, and not against the corporation. We think, that, to turn the plaintiff round to pursue the proposed remedy, would be trifling with him and with his just rights, and would be equivalent to declaring him remediless; and, in this case, at least, that there was a wrong where there is no remedy. It is notorious that, ordinarily, the action of bank directors is private,—that their records do not disclose the names of the individuals supporting or opposing any resolu-

the river, he was in the boat as a licensee, it owed him the duty to use proper care to carry him safely, and, whether an action could be maintained for a breach of the contract or not, it is liable to the plaintiff in an action of tort for neglect of that duty."

See Bathe v. Decatur County Agricultural Society, 73 Iowa, 11, 34 N. W. 484, 5 Am. St. Rep. 651 (1887).

[4] Facts sufficiently stated in the opinion, and part of the opinion is omitted.

tion or vote, and if they do, that the offending persons may be irresponsible and insolvent.

The language of Tilghman, C. J., in a case very similar to the present, in which it was urged that a corporation was not liable for a suit, but only the individuals committing it, is applicable here. "This doctrine," he said, "was fallacious in principle, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company might do great injury, by means of laborers having no property to answer damages," &c. Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 16, 8 Am. Dec. 675. To the same effect is the language of Shaw, C. J., in the case of Thayer v. Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157. He says, "The court are of opinion, that this argument, if pressed to all its consequences, and made the foundation of an inflexible practical rule, would often lead to very unjust results." * * *

The truth is, the action complained of as vexatious was instituted by the bank, in the name of the bank, and, as should be presumed, in just the same way and by the same agencies and means, as all other suits by these institutions are commenced and prosecuted, and nothing appears here, showing any different procedure than is usual, in actions by corporations. The action was brought for the sole benefit of the bank, for the recovery of money to which the bank was entitled, if anybody, and for an injury sustained by the bank in its corporate capacity. The bank, by its charter and the general laws, had power to sue for such a cause of action; and what seems to us yet more conclusive, is, that if this suit was originated by the misconduct of directors, or any officer of the company, it has never been repudiated, and may, by the acquiescence of the bank, be considered as sanctioned by it. Ang. & Ames, ch. 10, § 9. No act of agency appears here, which does not appear in all suits brought by corporations, and nothing to show that any individuals are, or ought to be, made responsible for the institution and prosecution of the groundless suit, as distinct from the corporation itself. * * *

But, after all, the objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much, that, as a corporation, it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort which essentially consists in motive and intention. The claim is, that, as a corporation is ideal only, it cannot act from malice, and therefore, cannot commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can

have a bad one,—they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned by the bank, in the usual modes of its action; and still to claim, that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application.

It is asked, how can the malice of a corporation be proved? It must be proved, it is said, as well as alleged, in an action for a malicious prosecution, as a distinct and essential fact; and the declarations and admissions of individual members, whether directors or others, are not admissible to prove it. True, malice must be proved, and, as we suppose, very much in the same manner as it is proved in other cases of a similar nature, against individual persons. The want of probable cause of action is proof of malice, and for aught we know, also, the records of the bank may show it. It is enough to say, in this, as in all other cases, that if the plaintiff cannot, in some legitimate way, prove the malice he has alleged, he cannot recover; but we have no right to assume it as a legal principle, that it cannot be proved.

We do not know that it has ever been adjudged that a corporation is civilly responsible for a libel. But, among the great variety and objects of these institutions, it is probable that the newspaper press has come in for its share of the privileges supposed to be enjoyed under corporate powers. Proof of the falsehood of slanderous charges is evidence of malice, and which must, as in this case, be proved; but, would it be endured that an association, incorporated for the purpose suggested, could, with impunity, assail the character and break down the peace and happiness of the good and virtuous, and the law afford no remedy, except by a resort to insolvent and irresponsible type-setters, and for no better reason than that a corporation is only an ideal something, of which malice or intention cannot be predicated? And, if, as we have suggested, the directors are, for all practical purposes, the corporation itself, acting at least as its representatives, we can see no greater difficulty in proving their motives good or bad, than in thus proving the motives of other associated or conspiring bodies. We are sure, that this objection of the defendants was not discovered, or was not regarded as sufficient, nor the difficulty of proving malice upon a corporation felt, when the case of Merills v. Tariff Manufacturing Co., 10 Conn. 384, 27 Am. Dec. 682, was tried at the circuit, and discussed and decided by this court. That was an action against a corporation for a malicious injury, and the sole question in this court was, whether, by reason of the malicious intent, the company was liable for aggravated or vindictive damages; and it was holden to be thus liable,

in a very elaborate opinion, drawn up, and strongly expressed, by Huntington, J.

The interests of the community, and the policy of the law demand that corporations should be divested of every feature of a fictitious character which shall exempt them from the ordinary liabilities of natural persons, for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection, for all their rights and privileges, and no more.

For the reasons suggested, a majority of the court is of opinion, that the nonsuit granted by the Superior Court should be set aside, and a new trial granted.

In this opinion, WAITE, J., concurred.

ELLSWORTH, J.[5] I do not feel quite satisfied that the plaintiff can recover against the defendants, for a malicious suit brought, in fact, by the directors of the bank. Certainly, no such action has been found in the books, though I admit there are analogous cases which show that courts have gone very far in subjecting corporations for wrongs, by their agents, but I think there are none going to the extent now claimed.

An indispensable requisite in an action for a malicious suit, is malice,—malice in fact,—a wicked criminal purpose. An unsuccessful suit is not sufficient. It must have originated in malice; and this idea of actual, as contradistinguished from legal malice is in my judgment deserving of the highest consideration. It gives character to the action. The language of Greenleaf (2 Greenl. Ev. 367) is, "To sustain this averment (malice), the charge must be shown to have been wilfully false." Now I ask, in view of this essential requisite, if any such malicious intent can be said to belong to a body of stockholders (the corporation), whose affairs are conducted by their agents, under the provisions of the charter of the company, and who, themselves, are in no way or manner really implicated in the supposed malicious intent? Again I ask, whose malice is the ground of the action? not the malice of the president and cashier,—not that of the directors; this is not even admissible in proof against the company. Whose malice then? Certainly not that of the ideal corporation; for this is a mere fictitious entity, and cannot entertain malice. It must never be forgotten, that malice, as already said, is the very ground and gist of the action, and no case has been read to us, of a recovery against a corporation, where there was not a perfect cause of action, independent of any malicious intention. Doubtless the directors may be guilty of malice, and of a malicious injury; but to proceed further, and subject stockholders, for their malice, is quite another question.

[5] A part of the opinion is omitted.

It is likewise to be kept in mind, that this action does not belong to that class of actions against corporations or other principals for injuries sustained, through a false confidence reposed by strangers in the supposed authority of agents. This action is for an original unauthorized wrong of the directors, and is in no way the result of any false confidence. It is a mere malicious contest between the directors themselves. The stockholders may well say: We cannot be involved in this malicious contest. We entertain no malice against Mr. Goodspeed, and no one can entertain it for us.

I think it has been incorrectly assumed, by counsel, that the malicious suit was brought by the East Haddam Bank. It was, in fact, brought by the major vote of the directors. They made use of the company name for their own malicious purpose, while they were only intrusted with the powers delegated, for a lawful and laudable purpose. The company do not at all admit that they are represented in this instance,—no more than they would, had the directors voted that the cashier should inflict personal chastisement upon Mr. Goodspeed, wherever he could find him. * * *

It is asked, will you not hold corporations to the same rule of justice and law, as you do all others? I answer, yes, where the cases are parallel. Now, this interrogatory assumes two things, which are not entirely clear or conceded, viz., that you can pass by the only actual malice in the case, and assume malice in the stockholders, or corporation, who are avowedly ignorant and innocent; and further, that the principal is liable for the wilful wrongs perpetrated by his agent. Now, I go for the same rule to all, and therefore, I hold, that those who in fact do the wrong must answer for it. If a different view of the case is taken, and corporations are held liable for the malicious acts of the directors, and other inferior agents, I insist, that a different rule is made to apply to them from others, and that the property of stockholders, vested under the exact limits and provisions of the charter, will be subjected to very great and alarming hazards.

These are, briefly, my views expressed with no little distrust, since some of my brethren feel well satisfied the plaintiff is entitled to recover.

In this opinion, HINMAN, J., concurred. STORRS, J., having tried the cause in the court below, was disqualified.

Nonsuit set aside, and new trial to be granted.*

* Accord: See (malicious prosecution) Edwards v. Midland Railway Co., 50 L. J. Q. B. 281 (1880); Reed v. Home Savings Bank, 130 Mass. 443, 39 Am. Rep. 468 (1879); (conspiracy) Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y. 669, 12 N. E. 825 (1887); Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290 (1894).

CITIZENS' LIFE ASSUR. CO., Limited, v. BROWN.

(Privy Council. L. R. [1904] App. Cas. 423.)

On appeal from the Supreme Court of New South Wales. Appeal from an order of the Full Court (October 31, 1902) refusing a rule nisi against the plaintiff to set aside a verdict obtained by him for £650. damages, and to enter a non-suit or verdict for the defendants, or for a new trial.

The appellants are an assurance company carrying on business in New South Wales. The respondent, Brown, was formerly employed by the appellant as a local agent. Brown left the employ of the appellants and entered the service of a rival company. For the purpose of inducing policy holders of the appellant to abandon their policies and insure with the rival company, statements derogatory to the appellant were made by Brown. Fitzpatrick, the superintendent of agencies for the appellant, issued a circular letter to certain policy holders in response to inquiries from them. Statements in this letter constituted the libel complained of. Some statements were untrue to the knowledge of Fitzpatrick. There was evidence of express malice on Fitzpatrick's part. The jury found for the plaintiff for £650. damages and also found that "Fitzpatrick was acting in publishing the libel within the scope of his employment, and in the course of his employment. Judgment was entered for the plaintiff on the verdict; and the Supreme Court refused to set aside the verdict, and enter judgment for the defendants, and refused to grant a new trial. Hence the present appeal.[7]

The judgment of their Lordships was delivered by LORD LINDLEY:[8]

* * * Counsel for the appellants contended, first, that the verdict was wrong in finding that Fitzpatrick acted in publishing the libel within the scope and in the course of his employment; and, secondly, that even if he did, yet the malice with which he wrote it cannot be imputed to the company. In support of this proposition reliance was placed on the well-known judgment of the late Lord Bramwell in Abrath v. North-Eastern Ry. Co., 11 App. Cas. 247, at page 250.

It will be convenient to dispose of the second question first. There is no doubt that Lord Bramwell held strongly to his opinion that a corporation was incapable of malice or motive, and that an action for malicious prosecution could not be maintained against a company. Lord Cranworth in Addie v. Western Bank of Scotland (1867) L. R. 1 H. L. Sc. 145, had expressed a similar opinion as to the liability of corporations for frauds. But these opinions have not prevailed, and their Lordships are not prepared to give effect to them. If it is once granted that corporations are for civil purposes to be regarded as persons, i. e., as principals acting by agents and servants,

[7] Statement of facts abridged. [8] A part of the opinion omitted.

it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious.

Their Lordships concur with the view of the Acting Chief Justice in this case that, if Fitzpatrick published the libel complained of in the course of his employment, the company are liable for it on ordinary principles of agency. Fitzpatrick's letter, although published on a privileged occasion, was not itself privileged; and not being privileged the letter must be treated as any other libel written and published by an officer of the company. * * * Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal, and the appellant company must pay the costs.[9]

VIII. Crimes

STATE v. MORRIS & E. R. CO.

(Supreme Court of New Jersey, 1852. 23 N. J. Law, 360.)

The defendant was indicted for maintaining a nuisance on a public highway by maintaining cars thereon and by erecting a building. Writ of error from a conviction in the trial court.[10]

The Chief Justice (Green). The indictment charges the defendants with the creation of a nuisance, by erecting a building upon the public highway, and continuing it there; and also by placing cars in the public highway, and suffering them to remain therein. The single question presented for the consideration of the court is, whether a corporation aggregate is liable to be proceeded against by indictment for any offence committed by active means or by an affirmative act, which must of necessity be charged to have been done vi et armis.

The law is well settled, that a corporation aggregate is liable to indictment. It is said, indeed, by Blackstone, that a corporation cannot commit treason, felony, or other crime, in its corporate capacity, citing the case of Sutton's Hospital, 10 Coke, 32. The original authority is simply, that a corporation cannot commit treason. While

[9] See Whitfield v. South Eastern Railway Co., E. B. & E. 115 (1858); McLay v. Corporation of Bruce, 14 Ont. 398 (1887); Philadelphia, etc., Ry. Co. v. Quigley, 21 How. 202, 16 L. Ed. 73 (1858).

[10] Statement of facts substituted.

it is conceded that a corporation cannot, from its nature, be guilty of treason, felony, or other crime involving malus animus in its commission, it be believed that there is no authority, ancient or modern, which denies the liability of a corporation aggregate to indictment, except an anonymous case, said to have been decided by Chief Justice Holt, in the Court of King's Bench, in the 13 Will. III (1701). The case is reported, in 12 Mod. 559, briefly as follows: "Note per Holt, Chief Justice. A corporation is not indictable, but the particular members of it are."

It may well be doubted whether this is not one of those cases which extorted from Lord Holt the bitter complaint of his reporters, "that the stuff which they published would make posterity think ill of his understanding, and that of his brethren on the bench." Aside from the apochryphal character of the report, it is hardly credible that so learned and accurate a judge as Lord Holt should have laid down the broad proposition imputed to him by his reporter. It is certain that while he was chief justice of the King's Bench, there were cases before that court of indictments against quasi corporations for neglect to repair roads and bridges.

Regina v. County of Wilts, 1 Salk. 359; The Queen v. Inhabitants of Cluworth, 6 Mod. 163, s. c., 1 Salk. 359, and in The Queen v. Saintiff, 6 Mod. 255, Lord Holt himself held, that if a common footway be in decay, an indictment must of necessity lie for it, because an action will not lie without a special damage. It seems to be true, moreover, as was stated by Talfourd, Sergeant, arguendo in The Queen v. Railway Co., 3 Queen's Bench, 227, that although there was at that time no direct authority in England for the position, that a corporation aggregate is indictable in the corporate name, yet the course of precedents has been uniform for centuries, and the doctrine has frequently been taken for granted, both in arguments and by the judges. The case of Langforth Bridge, Cro. Car. 365 (1635); Regina v. Inhabitants of the County of Wilts, 1 Salk. 359 (1705); The King v. Inhabitants of the West Riding of Yorkshire, 2 Blac. Rep. 685 (1770); Rex v. Inhabitants of Great Boughton, 5 Burr. 2700 (1771); The King v. Inhabitants of Clifton, 5 D. & E. 499 (1794); Rex v. Corporation of Liverpool, 3 East, 86 (1802); Rex v. Mayor of Stratford upon Avon, 14 East, 348 (1811); Rex v. City of Gloucester, Douherty's Crown Circ. Ass. 259.

Notwithstanding the frequent instances to be found in the books of indictments against aggregate corporations for neglect of duty imposed by law, the liability of a corporation to indictment was not expressly adjudicated in Westminster Hall until the very recent case of The Queen v. Birmingham & Gloucester Railway Co., 9 Car. & Payne, 469, 3 Queen's Bench, 223. In that case, it was directly adjudged that a corporation aggregate may be indicted by their corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute.

The same principle has been repeatedly recognized in the American courts, both before and since the decision in The Queen v. Birmingham & Gloucester Railway Company. Mower v. Leicester, 9 Mass. 250, 6 Am. Dec. 63; Howard v. North Bridgewater, 16 Pick. (Mass.) 190; Susquehanna & Bath Turnpike Co. v. People, 15 Wend. (N. Y.) 267; Freeholders v. Strader, 18 N. J. Law, 108, 35 Am. Dec. 530.

In this state, there is an express legislative recognition of the liability of corporations to indictment. The act of February 10, 1837 (Rev. Stat. p. 999), provides a mode of compelling the appearance of corporations to indictments, and of enforcing sentence upon conviction. It is not understood that the counsel for the defence question or deny the liability of a corporation aggregate to indictment. The question discussed upon the argument was, not whether a corporation aggregate may be indicted, but for what offence it may be indicted, or what offence a corporation aggregate may in its corporate capacity commit.

It is insisted, that although a corporation is liable to indictment for neglect of duty or mere nonfeasance, it cannot be indicted for any offence requiring for its commission a direct and positive act. I am aware of but two cases in which this question has been directly presented for judicial decision. In the case of State v. Great Works Milling & Man. Co., 20 Me. 41, 37 Am. Dec. 38, the defendants were indicted for a nuisance in the erection of a dam across the Penobscot river. At June term, 1841, the Supreme Court of Maine decided that the indictment could not be sustained, on the ground that where a crime or misdemeanor is committed by any positive or affirmative act, under color of corporate authority, the individuals acting, and not the corporation, should be indicted.

In The Queen v. Great North of England Railway Co., 9 Queen's Bench, 315, the defendants were indicted for cutting through and obstructing a highway, by works performed in a course not conformable to the powers conferred on the company by act of parliament. The indictment, after solemn argument and deliberate advisement, was sustained by the unanimous opinion of the Court of Queen's Bench, the court thus sustaining the principle, that a corporation aggregate may be indicted for a misfeasance.

These two authorities being directly in conflict, it may be necessary to consider the principle involved in the inquiry. It being conceded that an indictment will lie against a corporation aggregate for a nonfeasance, or for any cause whatever, all preliminary and formal objections arising out of the invisibility and intangibility of the body aggregate, the impossibility of arresting it, its inability to appear, its incapacity for punishment, and the injustice of punishing innocent stockholders for the acts of others, are at once disposed of. These objections apply, it is obvious, with equal force to indictments for acts of nonfeasance. If they are invalid as to the one, they are equally so as to the other.

But it is said, that although a corporation may omit to perform acts made obligatory upon it by law, and thus be liable for nonfeasance, yet from its very nature it cannot use force, and therefore cannot commit any act involving force, and which must be charged to have been committed vi et armis. This argument rests entirely upon the disability of the corporation to commit any act of trespass or positive wrong, and applies to its capacity to commit civil as well as criminal injuries. It is the very argument by which it was sought to be established that no action for a trespass or tort would lie against a corporation. But it has been well said, that if a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable civiliter for all torts committed by its servants or agents by authority of the corporation, express or implied. Thus it is liable in trover. Tarborough v. Bank of England, 16 East, 6; Duncan v. Surrey Canal, 3 Stark. 50; Foster v. Essex Bank, 17 Mass. 503, 9 Am. Dec. 168; Beach v. Fulton Bank, 7 Cow. (N. Y.) 485. In case for indirect injuries resulting from tortious acts as well as from negligence. Bridge v. Grand Junction Railway Co., 3 Mees. & W. 244; Chestnut Hill Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675; Thayer v. Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157; Bailey v. Mayor of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669, s. c. (in error), 2 Denio (N. Y.) 433; Baptist Church v. Schenectady & Troy Railroad, 5 Barb. (N. Y.) 79; Wilson v. Rockland Manufacturing Co., 2 Har. (Del.) 67. In trespass quare clausum fregit. Bloodgood v. Mohawk & H. Railroad Co., 14 Wend. (N. Y.) 54, s. c., 18 Wend. (N. Y.) 9. 31 Am. Dec. 313; Thatcher v. Dartmouth Bridge Co., 18 Pick. (Mass.) 501; Seneca Railroad Co. v. Auburn & R. Railroad Co., 5 Hill (N. Y.) 170; Van Wormer v. Mayor of Albany, 15 Wend. (N. Y.) 262. In trespass vi et armis to personal property. Maund v. Monmouthshire Canal Co., 4 Man. & Gran. 452; Hay v. Cohoes Co., 3 Barb. (N. Y.) 42; Whiteman's Executors v. Wilmington & Susq. Railroad Co., 2 Har. (Del.) 514, 33 Am. Dec. 411. And in ejectment. Dater v. Troy Railroad & Turnpike Co., 2 Hill (N. Y.) 631. So a corporation may be guilty of a disseisin, Second Precinct v. Catholic Cong. 23 Pick. (Mass.) 140; Proprietors of the Canal Bridge v. Gordon, 1 Pick. (Mass.) 297, 11 Am. Dec. 170; and even of an assault and false imprisonment, Eastern Counties Railroad Co. v. Brown, 2 Law & Eq. 406.

These cases have all arisen within the present century, and are certainly in conflict with the ancient doctrine, as laid down by the venerable sages of the law, if not by the authority of the courts. Liber Ass. fol. 100, pl. 67; Brooke's Ab. "Corporations," 43, "Trespass," 239; Com. Dig. "Corporations," F. 19, "Pleader," 2 B.; 2 Impey's Prac. 675; 2 Sell. Pr. 78; Viner's Ab. "Corporations," P.

§ 2, 2 § 15; 1 Saund. P. & E. 386; 1 Bl. Com. 476; 1 Wooddeson's Lec. 296; and 8 East, 230, per Lawrence, J. The earlier authorities, denying the liability of corporations civiliter for torts, are nearly all traceable to the dictum of Chief Justice Thorpe, in Liber Ass. 100, pl. 67, that "a writ of trespass lies not against a commonalty, for, he said, a man shall never have a capias or exigent against a commonalty." From this view of the law, it would seem that the difficulty in holding corporations liable civiliter for their tortious acts was originally supposed to consist not in the inability of the corporations to commit the wrong, but in the incapacity of the courts to administer the remedy.

The result of the modern cases is, that a corporation is liable civiliter for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural per on for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act. The doctrine is founded on sound principle, and applies, so far at least as the present objection is concerned, as well to the criminal as to the civil liability of the corporation.

It is further objected, that a corporation aggregate cannot be liable to indictment for any crime, because the commission of the criminal act is not warranted by their corporate powers. This argument, pushed to its legitimate conclusion, would exempt a corporation from all liability for wrongs, civil as well as criminal. It is most aptly answered by Mr. Binney, in his argument in Chestnut Hill Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 12. "According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal, and they are not answerable for the consequences. If the act be not within the range of their corporate powers, they had no right by law to do it; it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice."

But why should corporations be held liable for nonfeasance, and not for misfeasance? Why for neglect of duty, and not for violation of law? The startling incongruity of allowing the exemption, is (as was said by Lord Denman, in The Queen v. Great North of England Railway Company) one strong argument against it.

It is said, again, that the individuals who concur in making the order or in doing the work are individually responsible. And so is every servant or agent by whose agency a tort is committed, but it has never been supposed that the principal is therefore exempt from liability. On the contrary, the principle and the policy of the law has ever been to look to the principal rather than to the mere agent;

and in the case of corporations, it is the clear dictate of sound law not only, but of public policy, to look rather to the corporation at whose instance and for whose benefit the wrong is perpetrated, than to the individual directors by whose order the wrong was done, who may be entirely unknown, or to the laborers by whom the work was performed, who, in a great majority of cases, would be alike unknown and irresponsible.

It is true that there are crimes (perjury, for example) of which a corporation cannot, in the nature of things, be guilty. There are other crimes, as treason and murder, for which the punishment imposed by law cannot be inflicted upon a corporation. Nor can they be liable for any crime of which a corrupt intent or malus animus is an essential ingredient. But the creation of a mere nuisance involves no such element. It is totally immaterial whether the person erecting the nuisance does it ignorantly or by design, with a good intent or an evil intent; and there is no reason why for such an offence a corporation should not be indicted.

There is a strong reason, which does not seem to have been adverted to in the reported cases, why the corporation, and not the individual directors or laborers, should be indicted for the creation of a nuisance. The principal object of an indictment for a nuisance, is to compel it to be abated; and regularly a part of the judgment upon conviction is, that the nuisance be abated. 1 Hawk. P. C. ch. 75, § 14; Queen v. Inhabitants of Chuworth, 1 Salk. 358, s. c., 6 Mod. 234; 1 Chit. Crim. Law, 716; The King v. Stead, 8 D. & E. 142; Commonwealth v. Wright, Angell on Tidewaters, 222.

A similar judgment was rendered in the case of State v. King, in the Passaic Oyer and Terminer, which has since been affirmed in the Court of Errors and Appeals. If the rights of the corporation are to be concluded by the judgment, as in the present case, a valuable building, erected by the company at great cost for their own convenience, is to be ordered to be torn down as an encroachment upon the highway, there is peculiar propriety in making the corporation itself a party, and giving it an opportunity of being heard in defence. To condemn the property of the corporation to destruction upon an indictment against an irresponsible individual who was employed in the construction of the work, but who has no interest in the company, and who perhaps is hostile to its interests, savors strongly of the injustice of condemning them unheard. And it is not clear how the sentence is to be executed against the corporation, who are in possession, and in no sense parties to the proceeding.

I am of opinion that the judgment below should be affirmed.[11]

[11] The opinion of Nevius, J., is omitted.

Accord: The Queen v. Great North of England Railway Company, Queens Bench, 2 Cox, C. C. 70 (1846); Commonwealth v. Prop. of New Bedford

PEOPLE v. ROCHESTER RY. & LIGHT CO.

(Court of Appeals of New York, 1909. 195 N. Y. 102, 88 N. E. 22.)

HISCOCK, J.[12] The respondent has been indicted for the crime of manslaughter in the second degree, because, as alleged, it installed certain apparatus in a residence in Rochester in such a grossly improper, unskillful, and negligent manner that gases escaped and caused the death of an inmate. The demurrer to the indictment has presented the question whether a corporation may be thus indicted for manslaughter under section 193 of the Penal Code. * * *

Within the principles thus and elsewhere declared, we have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation, and make it criminally liable for various acts of misfeasance and nonfeasance when resulting in death, and amongst which very probably might be included conduct in its substance similar to that here charged against the respondent. But, this being so, the question still confronts us whether corporations have been so made liable for the crime of manslaughter as now expressly defined, in the section alone relied on by the people, and this question we think must be decisively answered in the negative.

Section 179 of the Penal Code defines homicide as "the killing of one human being by the act, procurement or omission of another." We think that this final word "another" naturally and clearly means a second or additional member of the same kind or class alone referred to by the preceding words, namely, another human being, and that we should not interpret it as appellant asks us to, as meaning another "person," which might then include corporations. It seems to us that it would be a violent strain upon a criminal statute to construe this word as meaning an agency of some kind other than that already mentioned or referred to, and as bridging over a radical transition from human beings to corporations. Therefore we construe this definition of homicide as meaning the killing of one human being by another human being.

Section 180 says that "homicide is either: 1. Murder; 2. Manslaughter;" etc. Section 193 says that: "Such homicide"—that is, "the killing of one human being * * * by another"—is manslaughter in the second degree when committed "without a design to to effect death. * * * 3. By any act, procurement or culpable negligence of any person, which * * * does not constitute the

Bridge, 2 Gray (Mass.) 339 (1854); State v. Baltimore & O. R. R. Co., 15 W. Va. 362, 36 Am. Rep. 803 (1879).

Compare Queen v. Birmingham & Gloucester Railway Co., 3 Q. B. 223 (1842); State v. President and Directors of the Ohio & Miss. Ry. Co., 23 Ind. 362 (1864).

[12] Statement of facts omitted and a part of the opinion, dealing with the common-law liability, is omitted.

crime of murder in the first or second degree, nor manslaughter in the first degree."

Thus we have the underlying and fundamental definition of homicide as the killing of one human being by another human being, and out of this basic act thus defined and according to the circumstances which accompany it are established crimes of varying degree including that of manslaughter for which the respondent has been indicted. In the definition of these crimes as contained in the sections under consideration (sections 183–193), we do not discover any evidence of an intent on the part of the Legislature to abandon the limitation of its enactments to human beings or to include a corporation as a criminal. Many of these sections could not by any possibility apply to a corporation and in our opinion subdivision 3 of section 193 relating to manslaughter manifestly does not. It is true that the term "person" used therein may at times include corporations, but that is not the case here. The surrounding and related sections are not calculated to induce the belief that it has any such meaning, and the classification of manslaughter as a form of homicide and the definition of homicide already quoted forbid it.

The judgment should be affirmed.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment affirmed.

NEW YORK CENT. & H. R. R. Co. v. UNITED STATES.

(Supreme Court of the United States, 1909. 212 U. S. 481, 29 Sup. Ct. 304.)

DAY, J.[18] This is a writ of error to the circuit court of the United States for the southern district of New York, sued out by the New York Central & Hudson River Railroad Company, plaintiff in error. In the circuit court the railroad company and Fred L. Pomeroy, its assistant traffic manager, were convicted for the payment of rebates to the American Sugar Refining Company and others, upon shipments of sugar from the city of New York to the city of Detroit, Michigan. * * *

Upon the trial there was a conviction upon all of the six counts, two to seven inclusive. The assistant traffic manager was sentenced to pay a fine of $1,000 upon each of the counts; the present plaintiff in error to pay a fine of $18,000 on each count, making a fine of $108,000 in all.

The facts are practically undisputed. They are mainly established by stipulation, or by letters passing between the traffic managers and the agent of the sugar refining companies. It was shown that the

[18] **Statement of facts sufficiently stated in the opinion, a part of which is omitted.**

established, filed, and published rate between New York and Detroit was 23 cents per 100 pounds on sugar, except during the month of June, 1904, when it was 21 cents per 100 pounds. * * *

Numerous objections and exceptions were taken at every stage of the trial to the validity of the indictment and the proceedings thereunder. The principal attack in this court is upon the constitutional validity of certain features of the Elkins act. 32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880. That act, among other things, provides:

"(1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation; and, upon conviction thereof, it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed.

* * * * * * * * *

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as of that person."

It is contended that these provisions of the law are unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged. The argument is that to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law. And it is further contended that these provisions of the statute deprive the corporation of the presumption of innocence,—a presumption which is part of due process in criminal prosecutions. It is urged that, as there is no authority shown by the board of directors or the stockholders for the criminal acts of the agents of the company, in contracting for and giving rebates, they could not be lawfully charged against the corporation. As no action of the board of directors could legally authorize a crime, and as, indeed, the stockholders could not do so, the arguments come to this: that, owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case. * * *

In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company

is exercising the authority conferred upon him. It was admitted by the defendant at the trial that, at the time mentioned in the indictment, the general freight traffic manager and the assistant freight traffic manager were authorized to establish rates at which freight should be carried over the line of the New York Central & Hudson River Company, and were authorized to unite with other companies in the establishing, filing, and publishing of through rates, including the through rate or rates between New York and Detroit referred to in the indictment. Thus, the subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company, whose acts in this connection are sought to be charged upon the company. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. 2 Morawetz, Priv. Corp. § 733; Green's Brice, Ultra Vires, 366. If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.

It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt influential in bringing about the enactment of the Elkins law, making corporations criminally liable.

This statute does not embrace things impossible to be done by a corporation; its objects are to prevent favoritism, and to secure equal rights to all in interstate transportation, and one legal rate, to be published and posted and accessible to all alike. New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 399,

26 Sup. Ct. 272, 50 L. Ed. 524; Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at. * * *

Judgment affirmed.

CHAPTER IV

RIGHTS OF STOCKHOLDERS

SECTION 1.—RIGHTS INCIDENT TO STATUS

I. Right to Inspect Records

KING v. MASTERS AND WARDENS OF MERCHANT TAILORS' CO.

(Court of King's Bench, 1831. 2 Barn. & Ad. 115.)

A rule was obtained in Michaelmas term, calling on the Masters and Wardens of the Company of Merchant Tailors to show cause why a mandamus should not issue commanding them to present the petitioners or their attorney to inspect and make copies of the books and records of the company at all seasonable times. The rule was obtained upon affidavits in which petitioners stated that they were members of the company of Merchant Tailors and alleged grounds upon which they believed that its affairs were improperly conducted and the officers unduly chosen, and complained of misgovernment in particular instances not affecting the petitioners themselves.[1]

Lord Tenterden, C. J.[2] Since I have had the honour of a seat on this bench, I have always thought that the power and authority of the Court were limited by the practice of our predecessors, and I have been anxious not to assume or be a party to assuming any authority for the exercise of which I could find no precedent. For this reason, when my attention was called to the terms of the present rule, which demands an inspection, and liberty to take copies, of all records, books, papers, and muniments belonging to this company, or relating to its affairs, I asked early in the discussion, if there were any precedent for granting a mandamus under such circumstances, my general recollection being that there was not, but that in all the cases where a mandamus had been granted, the application had been limited by some legitimate and particular object, in which the party had an interest. The cases which have been cited are no authority for this application: reliance has indeed been placed on some expressions of a general nature occurring in them; but general words, whether uttered by a Judge in court, or spoken elsewhere, or published in a treatise, must, on sound

[1] Statement of facts substituted.

[2] The concurring opinions of Littledale, Taunton, and Patterson, JJ., have been omitted.

principles of logic and criticism, be limited to the subject-matter on which they are employed: the attempt to carry them further only leads to error.

In Rex v. The Hostmen of Newcastle, 2 Stra. 1223, a question was depending as to the right of a party to be admitted into the company, and it was material to ascertain whether the master whom that party had served, had been admitted to his freedom in the corporation at large; a rule was prayed for generally on his behalf, to inspect the corporation books, and the Court said that every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though in a dispute with others; but they limited the rule to the book wherein admissions of freemen were entered. And so I believe in all the subsequent cases of the same kind, it will be found that the mandamus has been limited to the inspection of particular documents which related to a subject then in discussion, and in which the party applying had an interest. In Rex v. Tower, 4 M. & S. 162, which was the case of a copyholder, there was indeed no suit depending, but what were the facts? A distinct controversy had arisen between Lord St. Vincent, as tenant of a manor, and the defendant, as lord, on a particular subject, the cutting of underwood. On the Earl's application under these circumstances, the Court granted a mandamus to inspect the court-rolls, so far only as related to that subject. Lord Ellenborough there said, "The copyhold tenant claims a right to the underwood, against which the lord sets up a counter-right, and the lord has the custody of the muniments which contain the evidence of the manorial rights. And shall he, who is a trustee and guardian of the evidence of the tenants' rights, lock it up from them, and in a matter too where his own interest is in question? I do not see upon what principle of justice that is to be done." There are many instances of applications by copyholders, some, I believe, in which no suit has been depending, where questions have arisen as to the course of descent, or to customs within the manor, in which the party has shown himself to have a particular interest, and the Court has granted a mandamus to inspect the court-rolls, so far as related to the matter immediately in question; but I do not know that any case can be mentioned which goes further. In Rex v. Allgood, 7 T. R. 746, a freehold tenant of a manor applied for a mandamus to enable him to inspect the court-rolls and take copies of them, merely stating in his affidavit that he was such freehold tenant, that he had occasion to inspect the court-rolls, and that the inspection had been denied him. But the Court there were of opinion that unless there were some cause depending, the tenant had no right to call for the inspection, and they observed that in each of the cases cited in support of the rule (Rex v. Shelley, 3 T. R. 141, and other cases there referred to), there was some cause or proceeding instituted. The party there did not show any particular occasion with reference to which the inspection should be granted, and the Court refused to interfere. There appears, there-

fore, to be no instance in which a rule has been granted like that now applied for.

The object of the present application is an inspection of all documents. It is contended that that liberty may be claimed at any rate as to some; those particularly which regard the funds of the company. And it is said, admitting that those funds are vested in the master and wardens, they can only be vested in them as trustees for the fraternity. Be it so; this is not a court in which a cestui que trust can call upon his trustee for an account, or an inspection of deeds. Again, it is said that the fines now exacted on the admission of liverymen form a ground for this application. As far as I have means of judging, the persons who pray for this rule must all have paid those fines already. If they are exorbitant, and a party applying to take up his livery is refused admission unless he will pay such exorbitant demand, there a particular grievance arises, and the party may apply to this Court; in such a case there would be good ground at least for a rule to show cause; I do not say what would be the result of the application, but it would be in the ordinary course. Then it is said the terms of the oaths taken by freemen and liverymen of this company form a reason for granting an inspection of the ordinances to which the oaths refer. I do not say that, if a distinct application were made to the company for an inspection of those ordinances, and were refused, this Court would deny a mandamus; that case is not now before us; but the opinion of the Court on the matter at present in question would be no reason for refusing such a rule. The ground of our present decision is, that there is no instance of such an application as this having been granted. Nor can I see any good reason for allowing particular members of a body corporate to inspect every document belonging to such body. I am sure it would lead to great inconvenience and much expensive litigation. The rule must, therefore be discharged.

Lord TENTERDEN, C. J. The rule must be discharged with costs, because where parties make an entirely novel application, in which they fail, they ought to pay the expense of it.

Rule discharged with costs.

FOSTER v. WHITE.

(Supreme Court of Alabama, 1888. 86 Ala. 467, 6 South. 88.)

In this case, an application was made on the 30th January, 1889, in the name of the state, on the relation of Joel White, for a mandamus to T. Gardner Foster, as secretary and treasurer of the Montgomery Gas-Light Company, or the Montgomery Light Company, a private corporation, requiring him to allow the relator, who was a stockholder in said corporation, to inspect and examine its books,

records, and papers. The petition alleged that demand for an inspection of the books, etc., was made by the petitioner, as a stockholder, through P. C. Massie, "his attorney in fact, duly and legally authorized to that end;" and that "it was in all respects, as to time, place, and circumstances, reasonable and proper, having been made during the regular office hours of said Foster, at the office of said corporation, where its books and records were kept, and at a time when they were not being used by any other person." The defendant demurred to the petition (1) because it showed that the demand was not made by the stockholder himself, and it was not shown that he was personally incapacitated; (2) because it did not allege or show that the demand was made for any lawful purpose; nor (3) that any particular purpose or reason was specified. He also filed an answer, admitting his refusal to allow an inspection as demanded, in the absence of instructions from the president of the corporation, who was absent from the city at the time; and he set up a resolution of the board of directors, adopted after the demand and refusal in this case, instructing him to refuse an inspection of the books "to any agent of a stockholder, unless it is made apparent to him that the stockholder is physically unable to make the examination in person." The court overruled the demurrer, and granted a peremptory mandamus; and this judgment is here assigned as error.

CLOPTON, J. Section 1677, Code 1886, declares: "The stockholders of all private corporations have the right of access to, inspection and examination of, the books, records, and papers of the corporation, at reasonable and proper times." As we do not concur in the proposition that the statute is merely declaratory of the common law, it becomes unnecessary to consider the character and extent of the right of a shareholder, in the absence of statutory regulations, to inspect and examine the books and records of the corporation of which he is a member. The statute was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right; and the purpose is to protect small and minority stockholders against the power of the majority, and against the mismanagement and faithlessness of agents and officers, by furnishing mode and opportunity to ascertain, establish, and maintain their rights, and to intelligently perform their corporate duties. Its terms are clear and comprehensive, and afford narrow room for construction. It was intended to enlarge and disembarrass the exercise of the right, rendering it consistent and co-extensive with the stockholder's right, as a common owner of the property, books, and papers of the corporation, and with the duties and obligations of the managing officers, as agents and trustees. The only express limitation is that the right shall be exercised at reasonable and proper times; the implied limitation is that it shall not be exercised from idle curiosity, or for improper or unlawful purposes. In all other respects the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an exami-

nation opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them as such. If it be said this construction of the statute places it in the power of a single shareholder to greatly injure and impede the business, the answer is, the legislature regarded his interests in the successful promotion of the objects of the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded on the principle that the shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed.

It is further contended that, if the petitioner has the right, he cannot exercise it by an agent. The right may be regarded as personal in the sense that only a stockholder possesses and can exercise it, but the inspection and examination may be made by another; otherwise it would be unavailing in many instances. In Brewer v. Watson, 71 Ala. 299, it was held that an attorney at law, employed by a tax collector to settle his accounts with the auditor, has an interest which entitles him to an inspection of the book in which his client's accounts are entered, but that the auditor may demand evidence of his authority, and, on failure or refusal to furnish it, decline to allow the inspection. We perceive no sufficient reason why the same principle should not be extended to an attorney in fact. If a shareholder, who from physical infirmity, or want of skill and knowledge, or other cause, is unable to make a satisfactory and intelligent examination, is debarred the privilege of procuring the aid and services of a competent accountant, the right itself would be worthless,—a mockery. In State v. Oil-Works Co., 28 La. Ann. 204, it is said: "The possession of the right in question would be futile, if the possessor of it, through lack of knowledge necessary to exercise it, were debarred the right of procuring in his behalf the services of one who could exercise it."

In High, Extr. Rem. § 310, speaking of mandamus in cases like the present, it is said: "The writ will not be granted merely to enable a corporator to gratify an idle curiosity in the examination of the corporate records, but he must show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination is desired. And unless there is some particular matter in dispute between members of the corporation, or between the corporation and its individual members, or some specific purpose for which the inspection is necessary, mandamus will not lie, since the courts will not permit the use of the writ upon merely speculative grounds, or to gratify a spirit of curiosity." We do not assent to the narrow limits to which the jurisdiction is confined in King v. Tailor's Co., 2 Barn. & Adol. 115; that is, that the inspection must be shown

to be necessary in reference to some specific dispute or question depending, in which the parties have an interest. The purpose may be entirely prospective, and an examination would be proper and legitimate, if the object is to obtain information as to the management and condition of the affairs of the corporation, in order to enable the shareholder to determine whether any and what steps are necessary to establish or maintain his rights, or in order to enable him to discharge his corporate duties. Huylar v. Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274. Ordinarily, a mandamus will be awarded whenever an inspection and examination are necessary, for any reason, to protect the interests of the stockholders, present or prospective, and is not sought from idle curiosity, or for any improper or unlawful purpose.

The petition merely demands to inspect at a reasonable and proper time, and a refusal. In my own opinion, the petition should prima facie show a clear legal right to the examination of the books and records; and that a clear legal right is not shown unless the petition not only affirms that the demand was made at a reasonable and proper time, but also negatives that the inspection is sought from a spirit of curiosity, or for an improper purpose, thereby making the demand without both the express and implied limitations upon the statutory right. I am apprehensive that to establish the rule that a shareholder may demand an examination of the books and papers as often as he pleases, and, on being refused, obtain a writ of mandamus to enforce an absolute right, without being required to exclude all unfavorable intendments by proper averments in the petition, which must be verified, will prove detrimental to the interests of corporations and their stockholders. But the majority of the members of the court competent to sit in this case hold that the statute secures to the stockholder the general right to examine the books at any and all reasonable times. They hold, further, that, when this right is claimed and refused, he is entitled to a mandamus on the averments that he is a stockholder of the corporation, that he has demanded the right of inspection, that the time was reasonable and proper, and that the right was denied him. These averments being made, if there be any reason why the right should not be granted this is a matter of defense. The difference between us relating only to a matter of pleading, and not to any principle involved, I yield to the opinion of the majority.

The result is an affirmance of the judgment.[8]

McCLELLAN, J., not sitting.

[8] Accord: In re Steinway's Petition, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461 (1899).

PEOPLE ex rel. BRITTON v. AMERICAN PRESS ASS'N.

(Supreme Court, Appellate Division, First Department, 1912. 148 App. Div. 651, 133 N. Y. Supp. 216.)

Appeal from Special Term, New York County.

Mandamus by the People, on the relation of William R. Britton, against the American Press Association, to compel allowance of an inspection of defendant's stock book. From an order granting a peremptory writ, defendant appeals. Reversed, and motion denied.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

SCOTT, J. This is an appeal from an order granting relator's motion for a writ of mandamus to compel the defendant corporation to permit him to inspect its stock book.

Plaintiff is the owner of five shares of stock of the defendant corporation, and has demanded and been refused the right to inspect its stock book. The defendant meets the application by the statement of certain facts leading to the conclusion that the application is made in the interest of a business rival of the defendant, and that relator's purpose in seeking an examination is, in the language of the justice at Special Term, "sinister and inimical to the defendant." The relator makes no denial of the facts stated by defendant, and no disclaimer of the purpose attributed to him, and we are therefore justified in assuming that his attitude is inimical to the defendant, and that his purpose is to injure it in some way through the possession of the information which he seeks. It is definitely settled that the motives of a stockholder, however sinister, constitute no answer to an action by him to recover the penalty prescribed by statute for the refusal of a corporation to exhibit its stock book upon a proper demand. The statute recognizes an absolute right in the stockholder, and imposes an absolute duty upon the corporation and the custodian of the stock book. Henry v. Babcock, 196 N. Y. 302, 89 N. E. 942, 134 Am. St. Rep. 835.

The case just cited establishes the absolute right of the stockholder either to be allowed an inspection, or, if that be denied him, to a recovery of the penalty prescribed by statute. The right to a mandamus to compel compliance with the statute is not, however, specifically given by the written law, and there still remains open the question whether or not, in a case like the present, the court will aid a stockholder in pursuing his sinister designs upon the corporation by issuing its writ of mandamus. It has repeatedly been held that it will not (People ex rel. Althause v. Giroux Con. M. Co., 122 App. Div. 617, 107 N. Y. Supp. 188; People ex rel. Hunter v. Nat. Park Bank, 122 App. Div. 635, 107 N. Y. Supp. 369), and it would be unnecessary to further consider that question but for the fact that the court below was of the opinion, and counsel for the respondent strenuously argues,

that in some way the decision by the Court of Appeals in Henry v. Babcock has overruled the cases last above cited.

In neither of those cases was any question made as to the mandatory nature of the statute relied upon. That was assumed and conceded. The only question considered and decided was as to the granting of a peremptory writ to enforce an absolute right sought to be enforced for a sinister purpose. That is to say, the only question was as to granting a particular and extraordinary remedy, and this question is not touched upon in Henry v. Babcock, and, so far as the Court of Appeals is concerned, remains an open question. It is true that relator has a strict and absolute legal right to inspect the stock book, but the mere existence of an undisputed right, although necessary to the granting of a mandamus, is not sufficient of itself to require the issuance of the writ, for that still rests in the sound judicial discretion of the court. This has been the rule from the earliest times. So well established is it in this state that the granting or refusing of a writ of mandamus rests in the sound discretion of the Supreme Court that the Court of Appeals has uniformly refused to entertain appeals in such cases, unless it is made to appear that the discretion of the court has been abused. Sage v. L. S. & M. S. R. Co., 70 N. Y. 220; People ex rel. Lunney v. Campbell, 72 N. Y. 496; People ex rel. Faile v. Ferris, 76 N. Y. 326; In re Dederick, 77 N. Y. 595; People ex rel. Lentilhon v. Coler, 168 N. Y. 6, 60 N. E. 1046.

Doubtless the Legislature might have provided that a stockholder wrongly refused an inspection of a stock book might have a peremptory order in the nature of a mandamus to enforce his right, but it has not done so. In Matter of Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461, Judge Vann, writing for the court, examined exhaustively the right of stockholders to examine the books of a corporation, including the right conferred by the statute now invoked by relator, and the authority of the Supreme Court to enforce that right by mandamus. His conclusion was thus expressed: "We think that the common-law right of a stockholder with reference to the inspection of the books of his corporation still exists, unimpaired by legislation; that the Supreme Court has power in its sound discretion upon good cause shown to enforce the right; and that such power is part of its general jurisdiction as the successor of the Courts of the Colony of New York, which had the jurisdiction of the Court of King's Bench and the Court of Chancery in England."

It is quite unnecessary to cite authorities to sustain the principle referred to by Judge Vann that the exercise of the jurisdiction to grant mandamus rests, to a considerable extent, in the sound discretion of the court, and that in certain cases, although the applicant may have an undoubted legal right, and mandamus would be an appropriate remedy, still the court in the exercise of its sound discretion will refuse to issue the writ. Such a case is presented when the effect of the writ will be to enforce compliance with the strict letter of the

law in disregard of its real spirit. See High on Extraordinary Legal Remedies (3d Ed.) § 9. We need not speculate as to the particular purpose sought to be gained by providing by statute that a stockholder shall have the right to inspect upon demand the stock book of his corporation. It is quite safe, however, to assume that the Legislature intended that the right should be exercised for the benefit of the corporation itself, or of its stockholder as such, and that it did not intend that it should be exercised for the destruction or serious injury of the corporation and its stockholders generally, as it is the apparent purpose of the present relator to use the information which he seeks. In reversing the order appealed from therefore, we are holding nothing contrary to what was decided by the Court of Appeals in Henry v. Babcock. On the contrary, we concede that relator has a strict legal right to an inspection of the stock book. But, conceding that, following an unbroken line of authorities, we further hold that the application for a writ of mandamus is an appeal to our sound discretion, and that under the circumstances of the present case we should not exercise that discretion to issue the writ. The application and enforcement of this rule, as we conceive, will tend to carry into effect precisely what the Legislature intended. An applicant whose purposes are honest and who is not shown to be actuated by a sinister motive will have no difficulty in obtaining the inspection the statute allows him, while one who is shown to act from an improper motive will be relegated to the remedy which the statute itself provides.

For these reasons, the order appealed from will be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs.

INGRAHAM, P. J., and MILLER, J., concur.

CLARKE, J. (dissenting). The appellant is a domestic corporation, having an office for the transaction of its business in the borough of Manhattan, and is not a moneyed corporation or a railroad corporation. The relator is the holder of record of a certificate for five shares of the capital stock of the defendant. As a stockholder he demanded an inspection of the stock book of appellant, and, having been refused, brought this proceeding to obtain a peremptory mandamus to compel the corporation to permit such inspection.

In the answering affidavits the appellant attempts to show that the application is not made in good faith and for legitimate purposes, but in the interests of an inimical business rival. The learned court below granted the application and stated in its opinion: "That the stockholder of a corporation has an absolute right to an inspection of the stock book without stating his intent." The corporation appeals.

Section 32 of the stock corporation law (chapter 59, Cons. Laws 1909; chapter 61, Laws of 1909) provides that: "Every stock corporation shall keep at its office * * * a book to be known as the stock book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places

of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. The stock book of every such corporation shall be open daily during at least three business hours for the inspection of its stockholders and judgment creditors, who may make extracts therefrom. * * * Every corporation that shall neglect or refuse to keep or cause to be kept such books or to keep any book open for inspection as herein required, shall forfeit to the people the sum of $50 for every day it shall so neglect or refuse. If any officer or agent of any such corporation shall * * * neglect or refuse to exhibit the same or to allow them to be inspected and extracts taken therefrom, as provided in this section, the corporation and such officer or agent shall each forfeit and pay to the party injured a penalty of $50 for every such neglect or refusal and all damages resulting to him therefrom."

Section 33 of the statute contains somewhat similar provisions affecting foreign stock corporations having an office for the transaction of business in this state.

It is true that in said section a penalty is provided for a violation of the provisions thereof, and it is also true that it is not specifically provided that a mandamus may be issued to compel the observance thereof. People ex rel. Gunst v. Goldstein, 37 App. Div. 550, 56 N. Y. Supp. 306, was an appeal from an order commanding the defendant, the secretary and treasurer of a corporation, to produce the stock book of the company, and to allow the relator to inspect and to make extracts therefrom. In affirming the order, Mr. Justice Barrett, speaking for a unanimous court, said: "Then, too, the relator's motives are of no moment. The defendant has no right to question them. The inspection of its books by the president of the company is a matter of right."

In People ex rel. Callanan v. Keeseville, etc., R. Co., 106 App. Div. 349, 94 N. Y. Supp. 555, Mr. Justice Houghton, writing in the Third Department for a unanimous court, said: "We think his demand was sufficient, and that he had an absolute right of inspection, and that the peremptory writ of mandamus should have been granted. * * * The motives of a stockholder in inspecting the stock book alone are immaterial. * * * It was a privilege accorded him expressly by the statute and he should have been granted an inspection." And the order denying peremptory writ of mandamus was reversed; and the writ granted.

In People ex rel. Fennelly v. Amalgamated Copper Co., 110 App. Div. 892, 96 N. Y. Supp. 1141, affirmed 184 N. Y. 573, 77 N. E. 1193, and People ex rel. Fennelly v. United Copper Co., 110 App. Div. 892, 96 N. Y. Supp. 1141, affirmed 184 N. Y. 578, 77 N. E. 1194, orders directing a mandamus to compel inspection of the stock books were affirmed by this court and the Court of Appeals, in spite of voluminous allegations, as appears upon the inspection of the rec-

ords in those cases, that the inspection was desired from selfish and improper motives. But in People ex rel. Hunter v. National Park Bank, 122 App. Div. 635, 107 N. Y. Supp. 369, writing for a divided court, Mr. Justice Ingraham held that the granting of a mandamus is always in the judicial discretion of the court, and that a strict legal right would not be enforced when it appeared that the application was not made in good faith for a legitimate and proper purpose.

Henry v. Babcock & Wilcox Co., 196 N. Y. 302, 89 N. E. 942, 134 Am. St. Rep. 835, was an appeal from a judgment of the Appellate Division in the First Department in favor of defendant upon the submission of a controversy upon an agreed statement of facts. It is true that in that controversy was involved enforcement of the penalty provided by the statute for denial of the right to inspect, but this court (125 App. Div. 538, 109 N. Y. Supp. 853), although greatly divided, applied the doctrine which it had announced in People ex rel. Hunter v. National Park Bank, supra, saying: "Whenever application is made to inspect and the motive of the applicant is questioned, he should make known what the motive is so that the person having the book in charge may refuse to produce it, if the purpose is to work an injury to the corporation or is purely personal to the applicant and not connected with any interest which he has in the corporation. Here the plaintiff knew what his motive was. He refused to disclose it, and it is fairly to be inferred from that fact that the motive was not a proper one." The court gave judgment for the defendant.

With the above cited cases all brought to the attention of the Court of Appeals, that court said: "No doubt the Legislature could make the stockholder's privilege of inspection dependent upon the motive or purpose with which it is sought; but it has not seen fit to do so. The language of the statute is plain and mandatory. It recognizes an absolute right in the stockholder, and imposes an absolute duty upon the corporation and the custodian of the stock book. The law requires no statement or proof of any particular intent upon the part of the person demanding the inspection. He must be a stockholder and must prefer his request during business hours; that is all. * * * The plaintiff was refused any inspection at all in the absence of the disclosure of his purpose; and this action of the defendant has been sanctioned by the judgment of the Appellate Division. We think that judgment is based upon a mistaken construction of the statute in this respect." The judgment was reversed, and judgment directed for the plaintiff.

It will not do in my opinion to disregard the plain and emphatic language of the Court of Appeals upon the ground that it was obiter, that the proceeding before it was not mandamus. This precise statute was before it, and the judgment appealed from was based upon the prior decision of this court in mandamus proceedings, and upon the interpretation therein made of this statute, into which this court had read the requirement of establishing a proper motive or intent upon

the part of the applicant to entitle him to inspect. That claim the Court of Appeals brushed away and held emphatically that the language of the statute is plain and mandatory. It recognizes an absolute right in the stockholder, and imposes an absolute duty upon the corporation. If that be so, mandamus is an appropriate remedy to enforce that absolute right and compel the performance of that absolute duty. For this court to refuse to enforce such a mandatory statute so interpreted by the court of last resort is to set up its discretion against the clearly expressed will of the Legislature, and in my judgment to reverse, in effect, the Court of Appeals.

I therefore vote to affirm the order appealed from, with costs and disbursements to the respondent.[4]

LAUGHLIN, J., concurs.

II. VOTING RIGHTS

PEOPLE ex rel. PICKERING v. DEVIN.

(Supreme Court of Illinois, 1855. 17 Ill. 84.)

This was a proceeding by quo warranto, commenced by the State's Attorney on the relation of Pickering, against Joseph Devin, Elisha Embree, Robert Parkinson, J. N. Jacques, George W. Brown, Francis B. Thompson, Jonas Hardy, Samuel Thompson and James H. Embree, for usurping the offices of President and Directors of the Alton, Mt. Carmel & New Albany Railroad Company. The defendants pleaded to the information, that on the sixth day of June, A. D. 1853, there was an election held for nine directors of said company, at which all stockholders, legally qualified, had been notified to appear and cast their votes, at which time the respondents were duly elected, having received a majority of all the votes of the legally qualified stockholders, and were so declared elected; that they were each of them eligible, having the legal qualification required by the acts incorporating said company. To this plea the complainant filed several replications—denying that a legal election was held on the said sixth day of June, 1853—denying that the respondents received a majority of all the votes of the legally qualified stockholders on the said day—denying that the respondents were stockholders in the corporation. At September term, 1854, of the Edwards Circuit Court, the cause having been submitted to Marshall, Judge, without the intervention of a jury, judgment was entered for the respondents; thereupon Pickering took an appeal.

The evidence showed that a notice had been given as pleaded; that the election was held as notice required, and that the respondents were

[4] Contra: Venner v. Chicago City Ry. Co., 246 Ill. 171, 92 N. E. 643, 138 Am. St. Rep. 229, 20 Ann. Cas. 607 (1910).

declared elected; that a book containing a list of stockholders was produced, showing that each of the respondents held two shares of stock in said corporation, and also a valuation made to relator, showing him to be entitled to 1494 shares of stock issued to him by the board, for a portion of his interest in said road, by virtue of his purchase at a sale at public auction, made by the Governor of the State, by authority of the act of the 12th of February, 1849; that said 1494 shares of stock had been sold on execution against the company, and that Robert Parkinson became the purchaser; that Parkinson had transferred one half of this stock to Joseph Devin, and the remainder to James H. Northcott; that these shares of stock were those voted on at the election on the said sixth of June. Pickering offered in evidence the certificate of the Secretary of State, showing that a certificate of entry was made in the books of his office, declaring that the State was entitled to $5259^{7}/_{50}$ shares of fifty dollars each in the capital stock of said company; also, a certificate or declaration from the Governor of the State, that Pickering had become the purchaser of the right of way, embankments, &c., owned by the State in said railroad, for a sum specified, on the payment of which sum, he would be entitled to the legal evidences of his purchase; also, a conveyance from the Governor in conformity to the above certificate; also, a certificate for $5259^{7}/_{50}$ shares of stock issued to the State by said company, and assigned by the Governor to Pickering; also, a copy of the vote offered by him on the said sixth day of June, for certain persons therein named as directors, on the said 5259 shares of stock, which was rejected and the rejection thereof was written on the back of the vote and signed by the three judges or directors of the election; also, that Pickering offered to vote on 3756 shares of stock, which vote was rejected, and that the judges of the election refused to allow Pickering to vote at that election; that Pickering exhibited to the judges of the election all the evidences of his right and title to the stock, as hereinbefore recited, at the time he offered his vote.

CATON, J. Although many of the irregularities urged against the election of the defendants, we consider well taken, we shall principally confine ourselves to the refusal to allow the relator to vote on the stock which he had purchased from the State and still held. We shall not enter upon a review of the laws which authorized the Governor to sell this stock, and under which the relator purchased it. This point was conceded in the very election under which the defendants claim to hold their offices, for by far the greatest number of votes which they received was upon this very stock, and the only ground upon which the objection was placed to allowing the relator to vote upon the balance of that stock which had not been sold on the execution against the company, was that its transfer did not appear upon the stock-books of the company. This brings us to the simple question whether that objection was a valid one. In pursuance of law and by order of the board of directors, there had been issued, to the State, a

certificate of stock for 5259⁷/₈₀ shares. In pursuance of law, all of the interest of the State in the road was sold by the Governor, and a formal conveyance made to the purchaser, and an assignment of the certificate of stock was made on the back thereof by the Governor. This vested in the purchaser all the rights of the State to the stock, both legal and equitable, unless some statute of the State, or by-law of the company, prescribed some other mode of conveyance, or some additional formality. It may well be conceded that the company had the right to provide by by-laws that stock in the company should only be transferred upon transfer-books kept for that purpose, and even requiring the old certificates of stock to be surrendered and canceled, and new certificates issued to the assignee; but the evidence does not show, nor was there any pretence upon the argument, that any such by-law, resolution or order had ever been passed, either by the stockholders or board of directors. In the absence of such regulation, any mode or form of conveyance, sufficient in law to transfer the title to any other property or chose in action which by law is transferable, must be held sufficient to vest the legal title in the assignee, and entitle him to all the rights and benefits accruing to the legal owner of the stock, as much as if it had been transferred on the stock-books of the company, had there existed a by-law requiring such a mode of transfer.

Was then the relator entitled to vote, at the election in question, upon the stock which he had purchased of the State and then held? To this question but one answer can be given.

He not only shows to us, upon this record, that the stock had been regularly transferred to him, but he laid before the judges or directors of the election the evidences of such transfer, the same which we now have before us. Upon this evidence of his right, he offered to vote the 5259 shares for a set of directors other than the defendants, but the vote was refused. He then offered to vote 3765 shares, which were left him after deducting the 1494 shares which had been sold on the execution against the company, and which had already been voted for the defendants by the assignee of the purchaser at the sheriff's sale. This vote was also rejected, and the defendants declared duly elected. Had this latter vote been received, it would have decided the question at once against the defendants, and would have elected the candidates for which the relator offered to vote. Here was a manifest and gross violation of the rights of the relator, who owned more than two-thirds of the stock of the company, and yet who was allowed no voice in the election of the directors who were to manage its concerns; but a set of directors were thrust upon him, whose whole previous conduct, so far as this record shows, was hostile to his interests, and in whom he well might feel a want of confidence. Nor was he deprived of his rights in pursuance of any by-law which he, or those who had formerly owned the stock which he then held, had ever consented to. Had the owners of this stock, or their representatives

in the board of directors, adopted a regulation requiring any different evidence of the transfer of the stock than that which was presented, the case would have been different. But there is no pretence that such was the case. The persons having charge of the election, and who in no way represented the stock or stockholders, for the purpose of making rules concerning the mode of transfer, arbitrarily disfranchised the relator's stock, and treated him as an utter stranger. And in this, too, they were guilty of the grossest inconsistency, by allowing the vote on 1494 shares of stock for the defendants, of which there was no sort of transfer by the State, except the one under which the relator claimed the right to vote.

That the transfer by the sheriff, to the purchaser at his sale, was made in a mode conformable to their notions of propriety, could not help the case, for, in tracing back the title to this stock, reliance was necessarily had upon the transfer from the State to the relator, for through that alone could any claim of right to the stock be asserted. If, then, the relator's title was bad, the title of those claiming through him, under the same transfer, was necessarily defective also. But these inconsistencies are of little moment, except as showing the arbitrary manner in which the relator's rights were treated; for, although the vote admitted on the 1494 shares may have been illegally admitted, they still got some other votes which secured the defendants' election, if the vote of the relator was properly rejected. But we have no sort of doubt that he had a right to vote his stock and secure the election of those for whom he offered to vote, holding as he did a majority of all the stock offering to vote.

The election of the defendants was clearly illegal, and in manifest violation of the rights of the relator, and a judgment of ouster should have been entered by the Circuit Court, whose judgment must be reversed, and the proper judgment of ouster entered here.

Judgment reversed.[5]

STATE ex rel. WHITE v. FERRIS.

(Supreme Court of Errors of Connecticut, 1875. 42 Conn. 560.)

PARK, C. J.[6] The controversy in this case is with regard to the right of Lindley M. Ferris, Jr., to vote on five hundred and sixty-four shares of stock of the Hartford & Albany Transportation Company, at the annual meeting of the company for the choice of directors and other officers in the month of February, 1875. These shares formerly belonged in part and principally to the co-partnership of Murray, Ferris & Co., of which L. M. Ferris, Jr., was a member, and in part to L. M. Ferris, Jr., and at the time of the annual meet-

[5] Accord: People ex rel. Allen v. Hill, 16 Cal. 113 (1860).

[6] Statement of facts is omitted.

ing they still stood on the books of the company as belonging to them, although the firm of Murray, Ferris & Co. and L. M. Ferris, Jr., had previously been declared bankrupts, and an assignee of their estates had been appointed in bankruptcy. The by-laws and regulations of the Hartford & Albany Transportation Company, in force at the time of the annual meeting in question, required that certificates of ownership of stock should be signed by the president and secretary, and recorded upon the books of the company; and that whenever a stockholder should transfer his stock, the secretary should make an entry of the cancellation of the old certificate on the books of the company, and record the new certificate thereon, and lodge a certificate of the transfer with the clerk of the town, according to law. Some time previous to the annual meeting of the transportation company, L. M. Ferris, Jr., applied to the assignee in bankruptcy for a power of attorney to vote on these shares, and one was given him duly signed, and in proper form, with the exception of the name of the attorney.

These are the principal facts of the case, and we think they show that L. M. Ferris, Jr., had the right to vote at the annual meeting on the shares in controversy.

It has been repeatedly held by this court that the books and records of a corporation determine who are its stockholders for the time being, and who have the right to vote on the stock, although the same may have been sold, or pledged as collateral security. In such cases the party who appears to be the owner by the books of the corporation has the right to be treated as a stockholder and to vote on whatever stock stands in his name. Marlborough Manufacturing Co. v. Smith, 2 Conn. 579; Northrop v. Newtown & Bridgeport Turnpike Co., 3 Conn. 544; Vansands v. Middlesex County Bank, 26 Conn. 144; Gen. Statutes, Rev. of 1875, p. 279, §§ 8, 10; Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; Matter of Barker, 6 Wend. (N. Y.) 509; Angell & Ames on Corp. § 132.

Besides, in this case it appears that the assignee did not claim the right to vote on this stock at the annual meeting, but on the contrary consented in advance that L. M. Ferris, Jr., might vote on it. What matters it to the other stockholders which of these parties voted on the stock, so long as one party or the other manifestly had the right to vote, and both were agreed as to who should vote? The stock stood in the name of the co-partnership, of which L. M. Ferris, Jr., was a member, except a few shares which stood in his own name, and the assignee, the only other party in interest, assented to his voting on the stock. This being so, we think the other stockholders have no right to complain.

But it is said that the bankrupt act of the United States conflicts with this view of the case; and we are referred to sections 5044 and 5046 of the act. But these sections refer generally to the property of the bankrupt, and as applied to this case, mean no more than that

the stock is vested in the assignee. This appears by section 5051 of the act, which provides that "the debtor shall, at the request of the assignee, make and execute any instruments, deeds and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt." This provision is made in view of the fact that, in many cases, such instruments are necessary to transfer possession of the bankrupt's property to the assignee.

It is further said, that however it may be in regard to the right of L. M. Ferris, Jr., to vote on the stock, still he, and the other members of the firm, were not eligible to the office of directors unless they were stockholders. But L. M. Ferris, Jr., would not have had the right to vote unless he had been a stockholder, for the time being at least, for the power of attorney did not confer upon him that right, because his name was not inserted in it. He was a stockholder so far as the corporation was concerned, and so was R. M. Ferris, inasmuch as the stock stood in their names on the books of the company; and consequently they were eligible to office.

There is manifest error in the judgment complained of, and a new trial is advised. In this opinion the other judges concurred.[7]

TAYLOR v. GRISWOLD.

(Supreme Court of New Jersey, 1834. 14 N. J. Law, 222, 27 Am. Dec. 33.)

HORNBLOWER, C. J. This is a proceeding under the fourth section of the act to prevent fraudulent elections by incorporated companies, &c., passed the 8th of December, 1825. On the 3d day of August last, an election was held for directors, etc., of the Passaic & Hackensack Bridge Company, which resulted in the choice of George Griswold and others. An application is now made by John Taylor and others, to set aside that election on three distinct grounds, viz.:

1. That notice of the time and place of election was not given according to law.

2. That the inspectors acted contrary to law, in rejecting the votes that were offered by proxies; and

3. That the inspectors also erred, in allowing to each stockholder but one vote, instead of a vote for each share owned by him.

Each of these objections will be considered in the order above stated.[8] * * *

The last, and certainly the most important, though by no means, the most difficult question, remains to be answered, viz.:

Third. Are the stockholders entitled to only one vote each, or to a

[7] Compare American Railway-Frog Company v. Haven, 101 Mass. 398, 3 Am. Rep. 377 (1869).

[8] Part of the opinion, dealing with first two objections, has been omitted.

vote for every share of stock they respectively own? This question is not put in reference to the mere matter of election. The right to a plurality of votes, if it exists at all, extends to every subject that may be discussed, and every resolution that may be submitted at any meeting of the stockholders. The by-law does not restrict the right of voting upon shares, to the election of officers; nor did I understand the counsel as confining the rule to that subject. Indeed it is not easy to perceive how it can be, or why it should be so limited. If the right exists under this charter, it is a general right, and may be exercised upon every subject.

To my mind the answer to this question is perfectly plain, whether it is considered upon general and common law principles; or upon the terms of the charter itself.

1st. Upon general principles. Every corporator, every individual member of a body politic, whether public or private, is, prima facie, entitled to equal rights. If, for political purposes, every person residing within the chartered limits, and possessing the requisite qualifications, whether rich or poor, is a corporator, and entitled to an equal vote in the administration of its affairs. So too, if it is a private corporation, prima facie, the same parity exists. In joint stock companies, the owner of one share or action of the capital stock, is, in general, a member of the company; a corporator; and as such, entitled to, and cannot be denied, the entire rights and privileges of a member. Angell & Ames on Corporations, 62. Those rights and privileges, are definite and certain; they cannot be greater or different in one member, than they are in another. In Rex v. Ginever, 6 T. R. 735, the power of making by-laws, was delegated by the charter, in very comprehensive terms. A by-law, giving to the senior bailiff a casting vote in case of a tie, was held to be illegal. So a by-law, imposing an oath of office, where none was required by the charter, was declared to be invalid. Rex v. Dean, etc., 1 Str. 536. So a by-law, restricting or extending the right of admission as a member, or of eligibility to office, or prescribing new or additional tests, or qualifications to voters, is illegal. Rex v. The Wardens, etc., 7 T. R. 743; Rex v. Tapenden, 3 East, 186; Rex v. Spencer, 3 Burr. 1833; People v. Tibbets, 4 Cow. (N. Y.) 358; People v. Kip et al., 4 Cow. (N. Y.) 382, note; Angell & Ames on Corporations, 192; Id. 182, etc.

But the by-law contended for in this case, is as obviously a violation of the charter, as were those in the cases just cited. The charter, if not in terms, yet in its spirit and legal intendment, gives each member the same rights, and consequently, but one vote: whereas, this by-law, gives them unequal rights, and an unequal number of votes. It makes one a member for one purpose, and another a member for another purpose. It imposes a test or qualification unknown to the charter, by which to determine how many votes a member may give; whether one, five, ten or fifty. In short, a by-law excluding a mem-

ber from office, or from the right to vote at all, unless he owns five, or ten, or twenty shares, would not be a more palpable, though it might be a more flagrant violation of the charter. A man with one share, is as much a member, as a man with fifty; and it is difficult to perceive any substantial difference between a by-law, excluding a member with one share from voting at all, and a by-law reducing his one vote to a cipher, by giving another member fifty or a hundred votes.

The legislature have thought proper, in some instances, to annex certain and different degrees of rights, to certain and different quantities of property; sometimes they have given by express enactment, one vote for each share, and at other times, they have graduated the number of votes, by giving for each share not exceeding five or ten, one vote each, and then diminishing the number of votes as the number of shares are increased; but this charter is silent upon the subject, and therefore, the by-law is illegal and void.

2d. By the very terms of the charter, this question is completely put at rest. The first section incorporates the individuals by name, who were then the proprietors of the bridges; thereby conferring upon them severally, equal corporate rights and privileges, and making them, collectively, a corporate body. The second section, authorizes the company to purchase, and with the consent of "a majority of the body," to sell real estate, etc. The third section appoints the president, secretary, etc., by name, to continue in office until others shall be appointed in their places "by a majority of the stockholders, at a meeting of the said stockholders;" and then adds, "the said corporation or a majority thereof," may appoint annually, etc. And by the fourth section, the power to make by-laws is given to "the said corporation or a majority thereof."

In the first place, it is obvious to remark, that this charter incorporates certain individuals by name; that they therefore, and their successors and assigns, collectively constitute "the corporation," "the body," politic and corporate. When, therefore, the second section speaks of the consent of "a majority of the body," what "body" does it mean? The answer is inevitable; "the corporate body," "the body," politic and corporate. But what composes that "body"? The aggregate amount of property? or the collective number of individual proprietors who were incorporated? Manifestly the latter. The corporation property is not, in any sense, "a body" politic. "A majority of the body" then, can only mean, "a majority of the individuals comprising that body." The third section is, if possible, more explicit, and admits of no doubt. The officers named, are to continue until others are appointed—how? By "a majority of the stockholders," not by the holders of a majority of the stock. The difference between the two forms of expression, is too palpable to admit of illustration. To consider them as meaning one and the same thing, would

be to confound all langauge and destroy the use of terms. The distinction is plainly recognized, not denied by the court in Gray v. L. & S. Turnpike Co., 25 Va. 578, Angell & Ames on Corporations, 290. But it is said the term stockholders, is not used in the general authority subsequently given in the third and fourth sections, to appoint officers, and ordain by-laws. That is true, but the terms used, viz: "The said corporation or a majority thereof," evidently mean the corporators, or a majority of them, unless the property constitutes the corporation, and not the stockholders.

There is nothing then in this charter to change the common law rights and relative influence of the individual corporators. No rights or privileges are annexed by it to any specific or designated quantity of interest. It does not give the election of officers, and the control of the property to a minority of the corporators, as the by-law in question may do, and in practice as it seems by depositions, generally has done. If the charter gave to the stockholders a vote for every share, then they might claim and exercise that right, not on the mere ground of membership, but as a special chartered privilege. It was insisted, however, at the bar, that the legislature recognized the company when the act of incorporation was passed in 1797, with their by-laws and usages as they then existed; that the charter was in the nature of a legislative confirmation of their pre-existing by-laws and regulations, one of which was, that members might vote by proxy, and have one vote for every share they owned. That, therefore, their right to do so, is a chartered right.

This argument is too broad. If true, in its extent, the company could not repeal or modify any of its pre-existing rules. They have, upon this principle, become a part of the charter, part of its fundamental constitution, and cannot be changed, unless the charter gives the corporation power to do so. This it does not do. On the contrary, in terms, as well as on general principles, it restrains them from making any by-laws repugnant thereto. It is true, if an ancient, or other existing corporation, accepts a charter of confirmation, their rights, regulations and ancient usages, will not be superseded or impaired, except so far as the same are altered by, or repugnant to the new charter. Newling v. Francis, 3 T. R. 196; Rex v. Westwood, 7 Bing. 1, s. c. 20 Eng. Com. Law. Rep. 11, etc. But this is not a charter of confirmation; it is an original charter, creating and giving life to what did not before exist. If, therefore, this corporation has now any by-laws in force, on the subject of elections, or in relation to any other matter, it cannot be because such by-laws existed prior to the charter; but because the corporation, since its creation, has adopted them, either by a formal act of legislation, or by tacitly conforming to such pre-existing regulations; and in either case, their legality and validity are liable to be questioned in this, and in other courts of com-

petent jurisdiction. However prudent and advisable, it is not necessary, that a corporation should ordain its by-laws by a formal act of legislation, nor that they should reduce them to writing, unless required to do so by the charter: and this is all that is proved by the cases cited on this point. Angell & Ames on Corporations, 179, etc.; Union Bank of Maryland v. Ridgely, 1 Har. & G. (Md.) 324; Rex v. Ashwell, 12 East, 22; and see United States v. Fillebrown, 7 Pet 28, 8 L. Ed. 596; U. S. Bank v. Dandridge, 12 Wheat. 69, 6 L. Ed. 552.

Neither can the argument founded on the uniform practice and usage of this company, be maintained. It can have no prescriptive rights founded on immemorial usage; and the validity of any other must depend upon the charter. If that is ambiguous, or doubtful, usage may help us to fix the construction, but cannot alter its terms or change its fundamental constitution. Rex v. Miller, 6 T. R. 268; Rex v. Varlo, Cowp. 248, 250; Rex v. Ashwell, 12 East 22; Angell & Ames on Corporations, 64. Finally: the by-law in question is not authorized by the charter; is inconsistent with the popular spirit and design of the institution; is not essential or necessary to effect the object the legislature had in view; is contrary to the great principles and policy of our laws; and is not even for the apparent good of the company itself. It is, therefore, void. The object of the legislature was, to give permanency and protection to the public improvement that had been erected, and security to the individuals who had embarked in the enterprise. Instead of promoting and securing these legitimate designs, the tendency, at least, the apparent tendency, of the by-law in question, is to encourage speculation and monopoly, to lessen the rights of the smaller stockholders, depreciate the value of their shares, and throw the whole property and government of the company, into the hands of a few capitalists; and it may be, to the utter neglect or disregard of the public convenience and interest. I do not say, that such was the design, or that such has been the effect; but only, that the natural or probable tendency of the by-law in question, is to produce such a result.

If the by-law, allowing votes by proxy and a plurality of votes, had been a legal one, the vote repealing it, or rejecting the proxies, at the time of the election, could not have been justified or sustained; but as the by-law was illegal and void in itself, the proxies and the excess of votes, were properly rejected; and the application to set aside the election, must be denied. Void things are as no things; this is a universal rule. 22 Vin. Abr. 13, pl. 16, 17; Cable v. Cooper, 15 Johns. (N. Y.) 157.

I have not reached this conclusion, without the most serious and solemn consideration of the subject; and I may add, not without some reluctance, since a contrary practice has so long prevailed in this com-

pany. But my solemn conviction is, that "ita lex scripta est." The application must be denied.[9] * * *

Application refused.[10]

SCHWARTZ v. STATE ex rel. SCHWARTZ.

(Supreme Court of Ohio, 1899. 61 Ohio St. 497, 56 N. E. 201.)

Error to circuit court, Hamilton county.

An action in quo warranto was brought against the five plaintiffs in error to oust them from the directory of the Pape Bros. Molding Company, a corporation organized under the laws of the state of Ohio and doing business in Hamilton county, they having been elected in August, 1898, and continuing to hold notwithstanding the alleged fact that at an election in August, 1899, five others named were elected over them as directors of the board, which consists of nine members. Issues were joined for the purpose of determining which candidates for the directory were elected. The cause was submitted in the circuit court on an agreed statement of facts, which shows that at the election in August, 1899, the holders of a majority of the shares cast their full votes for the plaintiffs in error and four others, whose election as directors is not disputed. A minority voted their shares cumulatively for the five persons whose induction is claimed, except that one vote was given to each of the four whose election is not disputed. It resulted that the plaintiffs in error received the votes of the holders of a majority of the shares, but did not receive a majority of the votes; and that those whose induction is sought received a majority of the votes, but did not receive the votes of the holders of a majority of the shares. The circuit court rendered a judgment of ouster and induction, holding that those who by cumulative voting had received a majority of the votes were elected.

PER CURIAM. The correctness of the judgment depends upon the construction which should be given to section 3245, Rev. St., as amended April 23, 1898 (93 Ohio Laws, p. 230). The material portion of the section is as follows:

"Every stockholder shall have the right to vote in person or by proxy the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors shall not be elected in any other manner. A majority of the number of shares shall be necessary for a choice."

[9] The concurring opinion of Ford, J., has been omitted.

[10] See Proctor Coal Company v. Finley, 98 Ky. 405, 33 S. W. 188 (1895); Weinburgh v. Union Street Railway Advertising Co., 55 N. J. Eq. 640, 37 Atl. 1026 (1897). Compare: Beckett v. Houston, 32 Ind. 393 (1869).

Before the amendment of the statute it was held in State v. Stockley, 45 Ohio St. 304, 13 N. E. 279, that the statute did not authorize cumulative voting at elections of directors of corporations. For the plaintiffs in error it is contended that, although the amended statute plainly authorizes cumulative voting, the result of the election must in all cases be the same as before such voting was authorized. This is said to be the necessary result of the requirement that "a majority of the number of shares shall be necessary for a choice." We cannot suppose that the general assembly amended the statute to the end that it should remain unchanged. The amendment clearly authorizes two modes of voting; that is, either by or without cumulating shares. The requirement of a majority of shares must, in order that the clearly-defined purpose of the legislature be not defeated, be regarded as applying only when the shares are voted without cumulating. The statute affords no reason for the conclusion that votes were authorized for any purpose except to influence the result of the election. Judgment affirmed.

COMMONWEALTH ex rel. VERREE v. BRINGHURST.

(Supreme Court of Pennsylvania, 1883. 103 Pa. 134, 49 Am. Rep. 119.)

Before MERCUR, C. J., and GORDON, PAXSON, TRUNKEY, GREEN and CLARK, JJ.; STERRETT, J., absent.

Error to the Court of Common Pleas No. 2, of Philadelphia county; of January Term, 1883, No. 261.

Quo warranto, by the commonwealth of Pennsylvania, ex relatione John P. Verree et al., against John H. Bringhurst et al., to determine the right of the defendants to hold the office of directors of the Philadelphia Iron & Steel Company, a corporation chartered by special act of April 12, 1867 (P. L. 1211).

The suggestion of the relators set forth, inter alia, the following facts: Section 2 of the act of incorporation provides: "That the affairs of said company shall be managed by a board of five directors, one of whom shall be the president, who shall be chosen by the stockholders; all elections shall be by ballot, and every share of stock upon which the required installments have been paid in, shall entitle the holder thereof to one vote." Article 8 of the by-laws provides: "The stockholders shall meet on the second Thursday in October in every year, at such place in the city of Philadelphia as may be designated by the notice issued by the board." And article 9 provides: "The election of officers shall hereafter take place annually at the stated meeting in October."

On October 12, 1882, a stated annual meeting of the company was held, for the purpose of electing five directors to serve for the ensuing year, and to designate one of these directors as president of the company. At this election William W. Liebert, a stockholder, having voted upon 200

shares of stock in his own right, presented the proxy of Allen Middleton, who was the registered owner of 125 shares, and offered to vote the same in favor of the relators as directors, designating John P. Verree as president. Objection was made thereto, upon the ground that votes by proxy could not be given. The said vote by proxy was received by the inspectors of election under protest, the judge of the election deciding that the offer to vote by proxy was regular and lawful. Other votes by proxy were then received by the inspectors of election, also under protest. At the close of the poll the inspectors of the election refused to count any of the votes cast for the relators which had been given by proxy, amounting to thirteen hundred and fifty-two shares (notwithstanding the fact that the judge of the election had decided in favor of their validity), and reported to the meeting that two hundred shares had been cast for the relators for the office of directors, and two hundred shares for John P. Verree as president, and that twelve hundred and thirty shares had been cast for the defendants, John H. Bringhurst et al., and for John H. Bringhurst as president. The judge of the election refused to sign this report, and himself presented a report setting out that the relators had received a majority of all the votes according to the above facts.

The defendants demurred, upon the ground that, under the charter of the corporation, which did not expressly confer the power to vote by proxy, votes could not be received unless presented by the shareholder in person.

After argument the court sustained the demurrer and entered judgment for the defendants. Whereupon the relators took this writ, assigning for error the action of the court sustaining the demurrer.

MERCUR, C. J. The relators are stockholders of the Philadelphia Iron & Steel Company. It was incorporated by special act of 12th of April, 1867.

The contention is, whether the stockholders may vote by proxy, in the annual election of officers of the corporation?

Section 2 of the act declares "the affairs of said company shall be managed by a board of five directors, one of whom shall be the president, who shall be chosen by the stockholders. All elections shall be by ballot, and every share of stock upon which the required instalments have been paid, shall entitle the holder thereof to one vote." Section 3, inter alia, authorizes the corporation to "Make all needful rules, regulations, and by-laws for the well ordering and proper conduct of the business and affairs of the corporation. Provided the same in no wise conflict with the constitution and laws of this State or of the United States."

The charter in no wise refers to voting by proxy. No by-law has been adopted authorizing the stockholders to so vote.

In the absence of any express authority in the charter, and without

any by-law authorizing it, the question is whether the stockholders may vote by proxy. In other words, is it a power necessarily incident to the corporate rights of the stockholders?

A corporation is the mere creature of the law. It cannot exercise any power or authority other than those expressly given by its charter, or those necessarily incident to the power and authority thus granted, and therefore, in estimation of law, part of the same. Wolf v. Goddard, 9 Watts, 550; Diligent Fire Co. v. Commonwealth, 75 Pa. 291.

The right of voting at an election of an incorporated company by proxy is not a general right. The party who claims it must show a special authority for that purpose. Angell & Ames on Corporations, § 128; Philips v. Wickham, 1 Paige (N. Y.), 590. In this case, Chancellor Walworth says, the only case in which it is allowable at the common law is by the peers of England, and that is said to be in virtue of a special permission of the King. He adds: "It is possible that it might be delegated in some cases by by-laws of a corporation, where express authority was given to make such by-laws, regulating the manner of voting." In People v. Twaddell, 18 Hun (N. Y.), 427, it was held, a stockholder cannot so vote unless expressly authorized by the charter or by-laws. Taylor v. Griswold, 14 N. J. Law, 222, 27 Am. Dec. 33, holds that a right of voting by proxy is not essential to the attainment and design of a charter, and even a general clause therein authorizing the company to make by-laws for its government was insufficient of itself to give that right. In State v. Tudor, 5 Day (Conn.) 329, 5 Am. Dec. 162, there was no clause in the charter authorizing the stockholders to vote by proxy; yet the company made a by-law authorizing them to so vote. The validity of this by-law was sustained by a majority of the court. So in People v. Crossley, 69 Ill. 195, effect was given to a by-law of the corporation, authorizing voting by proxy, the by-law not being in conflict with the Constitution and laws of the state.

That a right to vote by proxy is not a common law right, and therefore not necessarily incident to the shareholders in a corporation appears to have been recognized in Brown v. Commonwealth, 3 Grant, Cas. 209, and in Craig v. First Presbyterian Church, 88 Pa. 42, 32 Am. Rep. 417.

The selection of officers to manage the affairs of this corporation requires the exercise of judgment and discretion. They must be elected by ballot. The fact that it is a business corporation in no wise dispenses with the obligation of all the members to assemble together, unless otherwise provided, for the exercise of a right to participate in the election of their officers. Although it be designated as a private corporation, yet it acquired its rights from legislative power, and it must transact its business in subordination to that power. As then the relators cannot point to any language in the charter expressly

giving a right to vote by proxy, and it is not authorized by any by-law, they have no foundation on which to rest their claim.

Judgment was correctly entered for the defendants on the demurrer. Judgment affirmed.

CONE v. RUSSELL et al.

(Court of Chancery of New Jersey, 1891. 48 N. J. Eq. 208, 21 Atl. 847.)

The complainants, Lorenzo H. Cone and Rebecca C. Cone, executors of Jonathan Cone and trustees under his will, by their bill, ask that the defendants, William F. Russell and Charles H. Mason, be enjoined from voting at any stockholder's meeting of the Upper Delaware River Transportation Company, by virtue of a proxy or power of attorney executed by them, four hundred and seventy-seven shares of the stock of said corporation belonging to them as executors, and pray that the power of attorney and a certain written agreement between the parties be decreed null and void and ordered to be delivered up to be cancelled. By this agreement the complainants were to give to the defendants a power of attorney, irrevocable for five years, to vote the stock held by them as executors in consideration of the defendant's agreement to so vote the stock as to secure Lorenzo H. Cone the office of manager of the corporation for a period of five years at an annual salary of $2,500. The power of attorney was duly executed in accordance with said agreement.[11]

PITNEY, V. C.[12] * * * Complainants base their right to the relief now sought upon three grounds: First. They say they were induced to enter into the agreement and execute the proxies by a fraud practiced upon them by the defendants, the particulars of which are set out in the bill. Ex parte affidavits on both sides, bearing on the question of fraud or no fraud, have been read. I deem it worth while to say, on this point, only that I think the fraud is not made out with sufficient certainty and clearness, and with sufficient weight of evidence, to warrant interposition by interlocutory injunction.

The second ground taken by the complainants is that the contract in question is against public policy, and tends to work a fraud on the other stockholders, and is void upon that ground. And the third ground is that the complainants, executors and trustees, had no right to depute their trust to others, as is done by this agreement, and that on that account also it should be decreed void.

The theory upon which the capital of numerous persons is associated in various proportions, in the shape of a trading corporation, to be managed by a committee of the stockholders, is that such committee shall truly represent and be subject to the will of the majority

[11] Statement of facts substituted.

[12] A part of the opinon is omitted.

in interest of the stockholders. The security of the small stockholders is found in the natural disposition of each stockholder to promote the best interests of all, in order to promote his individual interests. A member of an ordinary partnership has an additional security in the personal character of each of his partners, and may decline to be associated with any whom he does not know and approve. But a stockholder in a corporation cannot control the personnel of his associates, and must rely upon their self-interest alone.

Upon the foundation of the natural disposition of persons to promote their own interests rests the rule established in this state in the famous case of Taylor v. Griswold, 14 N. J. Law, 222, 27 Am. Dec. 33, that a trading corporation could not, without special legislative authority, make a by-law authorizing a stockholder to vote by proxy. The principle established by that case is "that the obligation and duty of corporators to attend in person, and execute the trust or franchise reposed in or granted to them, is implied in and forms a part of the fundamental constitution of every charter in which the contrary is not expressed;" and the reason given by Chief Justice Hornblower, 14 N. J. Law, at page 227, 27 Am. Dec. 33, and again by Justice Ford, 14 N. J. Law, at page 250, 27 Am. Dec. 33, is that the good of the stockholders, as well as of the public, requires that each stockholder should exercise his individual judgment as to all matters presented. In Fuller v. Dame, 18 Pick. (Mass.) 472, at page 484, Chief Justice Shaw says: "Mr. Fuller was one of the original proprietors of the Worcester Railroad. His associates had a right to believe that in all his acts as such stockholder, in choosing directors, in framing by-laws, and doing other acts, pursuant to the powers of the corporation, he had a common, and, in proportion to his shares, an equal, interest, and they had a right to rely on his judgment, his recommendations of directors, and other acts, with all the confidence inspired by such a belief."

Our legislature has, since the decision in Taylor v. Griswold, authorized the use of proxies, limiting them, however, to three years. But the principle still remains that the proxy is supposed to vote for the principal, and in his interest. If a majority of the stock is owned by one person, he has no right to use his power as such owner to advance his private interests at the expense of the minority. And in like manner he has no right to depute to another, who has little or no interest in the corporation, a power to use his stock for that purpose. Such deputation is the more dangerous because the person intrusted with the power has no such inducement to promote the interests of the corporation as the stock-owner has. Where the majority of the stock is owned by one man, or set of men acting in concert, the minority are, to some extent, protected by the natural interest of the majority to promote the real interest of the corporation; but where a person who has little or no actual ownership has the unrestricted voting power of a majority of the stock, the minority loses this protection,

and what may be properly termed the underlying and fundamental understanding and contract upon which the association is founded is abandoned and broken.

The motive which may induce the owner of a controlling interest in the corporation to deprive himself of and depute to another the power to use it as he may see fit, during a fixed period, may be of little consequence to his associates, but is usually found in some consideration of personal gain. In the case in hand it is the employment of complainant L. H. Cone as manager for a fixed term, and at a fixed salary, and irrespective of the actual value of his services. The avowed object and purpose of the defendants was to secure to themselves like employment and salaries. The mere statement of the affair seems to me to condemn it. The motive was in itself improper and unlawful. Servants of a corporation should be employed and paid upon their merits; and buying votes for an office in a corporation is of the same objectionable character as buying them for a public office. The same may be said of buying the right to control the business policy and management of the affairs of a corporation.

In Guernsey v. Cook, 117 Mass. 548, Id., 120 Mass. 501, the contract was that the defendant, who with another, acting in concert with him, owned the majority of the stock of a corporation, agreed with the plaintiff that the plaintiff should be employed as treasurer, at a salary of $3,500 per year, and should purchase 100 shares of the defendant's stock at par, but leave it in the control of the defendant, and, in case plaintiff should be discharged as treasurer, defendant should repurchase the shares at the same price, with interest. Plaintiff was discharged, and brought his action for the price of the shares of stock. The contract was declared to be void as a fraud upon the other stockholders, and as against public policy; and the action, "which," to use the language of the court, "is not in avoidance, but in direct affirmance, of the contract," was defeated. The reasoning of the court in arriving at this conclusion seems to me to be sound.

This case was followed by Woodruff v. Wentworth, 133 Mass. 309, where it was held that a contract between two stockholders in a corporation, by the terms of which one, in consideration of a sum of money paid to him by the other, agrees to vote for a certain person as manager of the corporation, and also to vote to increase the salary of the officers of the corporation including that of the manager, is void as against public policy; and doubt is expressed as to whether such assent would cure its vice. In Foll's Appeal, 91 Pa. 434, 437 (36 Am. Rep. 671), the supreme court of Pennsylvania went so far as to refuse specific performance of a contract to sell a comparatively few shares of stock in a national bank, where the avowed object was to enable the purchaser to obtain the control of the bank, and who, for that purpose, had already bought up, largely with borrowed money, almost a majority of the stock. The learned judge, speaking for the court, says: "The stock, as now held, is scattered among a variety of

people, and held in greater or lesser amounts. It is difficult to see how the small stockholders who have modest earnings invested in it, the depositors who use it for the safe-keeping of their money, or the business public who look to it for accommodation in the way of loans, are to be benefited by the concentration of a majority of its stock in the hands of one man, or in such a way that one man and his friends shall control it. Especially is this so when, as here, an attempt is made to control it by the use of borrowed capital. The temptation to use it for personal ends, in such case, is very strong." For an instance of the abuse of power by an actual majority in ownership of stock in a corporation, see Meeker v. Iron Co. (C. C.) 17 Fed. 48.

Following the reasoning of these cases, I conclude that the contract complained of in this suit is void as against public policy. This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders. The propriety of the object validates the means, and must affirmatively appear. * * *

For these reasons I am of the opinion that the contract and proxy set out and mentioned in the bill are void, and complainants are entitled to relief against them, and that the injunction prayed for must go. I will advise an order accordingly.[13]

SMITH et al. v. SAN FRANCISCO & N. P. R. CO. et al.

(Supreme Court of California, 1897. 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119.)

Smith, Foster and Markham purchased stock in the defendant corporation under a pooling agreement whereby it was agreed that the stock should be voted as a unit for the period of five years, the vote to be cast as determined by ballot between them. At a meeting for the election of directors held before the five-year period had elapsed, Smith, who was present in person, sought to vote the stock standing in his name regardless of a ballot duly taken by Foster and Markham, he declaring he refused to be bound thereby. Foster offered to vote the same stock according to the ballot taken. The vote of Smith was rejected and that of Foster accepted. The votes so rejected and so accepted were sufficient to change the result of the election. This action was brought under the Code to determine the validity of the election.

The superior court gave judgment in favor of the plaintiff.[14]

HARRISON, J.[15] * * * The instrument executed between the

[13] Compare: Chapman v. Bates, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459 (1900).

[14] Statement of facts substituted.

[15] Part only of the opinion is given.

parties must * * * be held to be a proxy, and to authorize the vote of the 42,000 shares of stock to be cast in accordance with the determination of the majority of the parties thereto; and, if it was made upon a consideration sufficient to bind the parties to its enforcement, it must be regarded as still operative. One of the inducements for the purchase of the stock, and under which the parties entered into the agreement, was that the shares should be voted in one body, and held for five years as a unit. It is immaterial that the voting agreement was not reduced to writing and executed until after the bid had been made for the stock. It was so executed before the parties thereto had completed the purchase, and become the owners of the stock by paying the purchase price. Nor is the validity of the agreement or the effect of its terms different by reason of different certificates having been issued in the names of the several parties to the transaction, rather than in the name of one of them. The agreement between them was with reference to the 42,000 shares of stock, and that it should be voted as a unit, and the purpose of the agreement was the economical management of the road, and to prevent irresponsible persons from getting control.

It was within the power of the parties to contract in reference to this property as fully as with regard to any other property. They were at liberty to make as a condition of their purchase that its management should be held by either of them, or by a majority of the three, and the terms of the agreement for such purchase could not be repudiated by either after the purchase had been made. It may be assumed that neither of the parties would have entered into the transaction or agreed upon the purchase of the stock except upon these conditions, and it must be held that each contributed his money to the purchase of the stock upon the promise made to him by the others. There was thus a sufficient consideration for the agreement granting the right to vote the stock. It was in the nature of a power coupled with an interest, and, being given for a valuable consideration, could not be revoked at the pleasure of either. Hey v. Dolphin, 92 Hun, 230, 36 N. Y. Supp. 627.

Although the court, in excluding this evidence, assumed that the instrument was valid, counsel for respondents have presented an argument in support of their further objection thereto that the instrument is invalid by reason of being against public policy; and it therefore becomes necessary to consider this objection, inasmuch as the action of the court, rather than its reason for so acting, is to be reviewed: for, if the instrument is invalid, the refusal of the court to allow any effect to be gained from its exercise was proper.

"Public policy" is a term of vague and uncertain meaning, which it pertains to the lawmaking power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some

well-established rule of law. Sir George Jessel, as master of the rolls, said in Besant v. Wood, 12 Ch. Div. 605, that public policy is "to a great extent a matter of individual opinion, because what one man or one judge might think against public policy another might think altogether excellent public policy." And in another case (Registering Co. v. Sampson, L. R. 19 Eq. 465) the same jurist said: "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice."

It is not in violation of any rule or principle of law for stockholders who own a majority of the stock in a corporation to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, and for this purpose to appoint one or more proxies, who shall vote in such a way as will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or upon the officers whom they will elect; and they may do this either by themselves or through their proxies, or they may unite in the appointment of a single proxy to effect their purpose. Any plan of procedure they may agree upon implies a previous comparison of views, and there is nothing illegal in an agreement to be bound by the will of the majority as to the means by which the result shall be reached. If they are in accord as to the ultimate purpose, it is but reasonable that the will of the majority should prevail as to the mode by which it may be accomplished. It would not be an illegal agreement if articles of partnership should provide that stock in a corporation owned by the partnership, though standing in the individual names of the partners, should be voted by one of its members; and it is no more against public policy for such an agreement to be entered into between stockholders whose interests in the stock are separate than where their interests are joint.

Viewed from considerations of public policy merely, it is immaterial whether such an agreement is made by the members of an existing partnership, which owns the shares, or in pursuance of an agreement by two or more persons to form a partnership for their purchase, or to purchase them for their joint account, or as one of the terms of an agreement for their purchase by persons who contemplate no relation to each other, further than that of owning stock in the same corporation. Such agreement would in any case be outside of the corporation, and disconnected with the interest of every other stockholder, and in either case the same rules would control. Whether such an agreement is illegal, so that any action or vote under it can be set aside, or is of such a character that it will not be enforced, will depend upon the object with which it is made, or the acts that are done under it, and will be governed by other rules of law. * * *

In cases of "voting trusts," where the owners of stock transfer the

shares to trustees with authority to vote at elections according to the direction of a majority of those holding trust certificates, and the only consideration for such transfer and agreement is the mutual promises of the several stockholders, it has been held that any stockholder may revoke his agreement and withdraw his stock at will; and it is also held that stockholders who become such after an agreement of this nature is entered into are not bound by its terms, but will hold their shares freed from the limitations of the agreement. * * *

The agreement in question cannot be regarded as illegal by reason of being in restraint of trade. The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. Section 1673, Civ. Code, makes void every contract by which one is restrained from "exercising a lawful profession, trade, or business," except in certain instances. But this is far different from a contract limiting his right to dispose of a particular piece of property except upon certain conditions. As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy; and there is nothing inconsistent with public policy for two or more persons who contemplate purchasing certain property to agree with each other, as a condition of the purchase, that neither will dispose of his share within a limited period, or for less than a fixed sum, or except upon certain limitations. They have the same right to contract with reference to the terms under which they will hold or dispose of the property after it shall have been purchased, as they have to agree upon any other terms upon which the purchase shall be made; and they no more violate a rule of public policy in making such agreement a consideration of their purchase than would two or more partners, who should purchase property for partnership purposes, and agree that it should not be disposed of unless their vendee would assent to certain conditions regarding its use. These terms enter into and form a part of the consideration for the agreement to purchase, and are as binding and enforceable as any other terms of the agreement. Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816; Williams v. Montgomery, 148 N. Y. 519, 43 N. E. 57; Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741.

The contract in Fisher v. Bush, 35 Hun (N. Y.) 641, was held to be invalid for want of any other consideration than the mutual promise of the parties; but it was said in that case: "If these parties and their associates were the promoters of this corporation, then, doubtless, they could have entered into a valid agreement regulating a sale of the same, and requiring the owners to hold them from market for a reasonable and definite period of time, and thus forbidding a sale by either of his interests to one against whom his associates might have a reasonable objection. Moffatt v. Farquhar, 7 Ch. Div. 591; reported in 23

Moak, Eng. R. 731. A stipulation of that character would not be illegal, as against public policy, as it would be simply a provision, assented to by all, that the newcomer into the business transaction should be with the approval of the other joint owners."

Neither is it illegal or against public policy to separate the voting power of the stock from its ownership. The statute authorizes the stockholder to vote by proxy, and it was held in People's Home Sav. Bank v. Superior Court of City and County of San Francisco, 104 Cal. 649, 38 Pac. 452, 29 L. R. A. 844, 43 Am. St. Rep. 147, that a by-law restricting the selection of proxies to stockholders was invalid, that the statute places no limitation upon the right of selection, and that a stockholder may appoint as his proxy one who is an entire stranger to the corporation. The right to appear by proxy implies, of itself, that the voting power may be separated from the ownership of the stock; and, unless the authority of the proxy is limited by the terms of his appointment, he is necessarily required to use his own discretion in any vote that he gives. Being the agent of the stockholder, he is required to exercise this discretion in behalf of his principal; but he is at liberty to use his own discretion as to the means by which his principal's interest will be best subserved. The cases in which it has been said that the stockholder could not divest himself of the voting power of his stock, and that it should not be separated from the ownership of the stock, were cases which involved either the sufficiency of the agreement by which the voting power was transferred, or the validity of the purpose for which the power was to be exercised. The proxy must exercise a discretion of the same nature as that which the stockholder is authorized to exercise, and an authority to do otherwise would be invalid; but the authority to exercise a discretion differs from an authority to perform a particular act.

Under an appointment without words of limitation, the proxy may act against the interests of the stockholder, or even against the interests of the corporation, and the corporation, as well as the stockholder, will be bound by his act as fully as if the stockholder had acted in person; while, if the authority had been directed in terms to that act, it might have been invalid. The distinction is that between an unlawful exercise of a lawful power and the attempt to authorize the exercise of an unlawful power. The question has been presented in cases of voting trusts, but an examination of these cases will show that the question has arisen either when the authority was expressly given to carry out some illegal purpose, or when, having been given without any consideration, though purporting to be for a definite term, subsequent owners of the stock have sought to revoke it before the expiration of the term. Shepaug Voting-Trust Cases, 60 Conn. 553, 24 Atl. 32, sometimes reported under the name of Bostwick v. Chapman; White v. Tire Co., 52 N. J. Eq. 178, 28 Atl. 75.

We have been cited to no instance where the purpose of a proxy given upon a sufficient consideration was lawful, and the person by

whom the proxy was created continued to be the owner of the stock, in which the agreement has been held invalid. The stockholder cannot separate the voting power from his stock by selling his right to vote for a consideration personal to himself alone, any more than he could agree, for the same consideration, to cast the vote himself; and an agreement with others to appoint a proxy upon the same considerations would be equally invalid. In Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847, an agreement by the purchaser of stock to give to other stockholders his irrevocable proxy, for the purpose of securing and maintaining the control of the company, was held invalid, for the reason that it was one of the terms of the agreement that the directors to be elected under its provisions should employ the one giving the proxy at a fixed salary during its existence. Such an agreement was held to operate as an inducement to elect directors who would not act disinterestedly for the benefit of all of the stockholders, but rather to promote the interest of the parties to the agreement alone, and was therefore void, as being against public policy. The court, however, said: "This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders."

It was upon this principle that the agreements in Hafer v. New York, etc. R. R. Co., 14 Wkly. Law Bul. (Ohio) 68, Guernsey v. Cook, 120 Mass. 501, and Fennessy v. Ross, 5 App. Div. 342, 39 N. Y. Supp. 323, were held invalid. The same principle was declared in Gage v. Fisher, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557. In Railroad Co. v. Nicholas, 98 Ala. 92, 12 South. 723, the court held that there was nothing illegal or contrary to public policy in separating the voting power of the stock from its ownership, saying: "Where a proxy is duly constituted, and the power of the appointment is without limitation, the vote cast by the proxy binds the stockholder, whether exercised in behalf of his interest or not, to the same extent as if the vote had been cast by the stockholder in person. The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground that there has been a separation of the voting power from the stockholders, but because of the unlawful purpose for which the proxy was appointed, or the unlawful end attempted to be effected by the exercise of the voting power." * * *

The judgment and order denying a new trial are reversed.[16]

VAN FLEET, McFARLAND, and HENSHAW, JJ., concurred.[17]

[16] See Kreissl v. Distilling Company of America, 61 N. J. Eq. 5, 47 Atl. 471 (1900). Compare Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32 (1890).

[17] The dissenting opinion of Beatty, C. J., is omitted.

BOYER v. NESBITT.

(Supreme Court of Pennsylvania, 1910. 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 890.)

Appeal from a decree dismissing a bill in equity. The bill was brought to revoke a voting trust, which by its terms was to continue for a period of five years, with the provision for further continuance at the desire of a majority. The facts appear in the opinion.[18]

ELKIN, J. It is apparent from this record that many citizens of the city of Wilkes-Barre desirous of building up a local enterprise procured the incorporation of the Adder Machine Company, and became subscribers to its capital stock. It is in the nature of a private trading corporation, and questions of public policy relating to public and quasi public corporations do not arise. After the business of the corporation had been successfully started under competent and satisfactory management, a large number of the shareholders representing a majority of the stock concluded that the mutual interests of the stockholders, as well as the interest of the corporation itself, would be best served by a continuation of the business policy of the company inaugurated by the officers then in control of its affairs. To effectuate this purpose, an agreement in writing was entered into between all of the stockholders who chose to become parties to it and the three stockholders who at the time of its execution had formulated the policy of the company, and were directing its business affairs.

This agreement named the three persons then constituting the board of directors and in charge of the business management of the company as trustees. It defined the rights of the shareholders on one side, and the powers and duties of the trustees on the other. The duty of management was imposed upon the trustees who accepted the responsibilities and have continued to perform the duties of their trust. Under the agreement, each of the contracting shareholders transferred his stock to what is called voting trustees who surrendered the same to the corporation, and received new certificates in the individual names of the trustees in lieu thereof. The trustees then issued trust certificates to the shareholders who had thus contracted, defining the rights and interests of the contracting parties. The trustees therefore hold the legal title to the stock, have imposed upon them the duties of management, and are clothed with power to continue through their stock control a business policy helpful to the corporation and beneficial to the shareholders.

The important question raised by this appeal is whether this agreement is invalid because against sound public policy. It may be conceded that the question is not free from difficulty, and in our own state there is no decided case squarely ruling it. In other jurisdictions, courts have differed as to the rule properly applicable to such a state

[18] Statement of facts substituted.

of facts and creditable authority may be cited in support of either side of the present controversy. Courts as a rule have predicated their decisions upon the character of the trust agreement and the statutory requirements as to the control and management of corporations in the particular state where the question arose.

In Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32, and Warren v. Pim, 66 N. J. Eq. 353, 59 Atl. 773, the leading cases cited by counsel for appellant, the courts treat the question of public policy indicated by the statutes of the respective states as the basis of their reasoning and the foundation upon which their conclusions rest. This seems to be the sounder rule because the public policy which should prevail in the management and control of corporations is primarily a legislative rather than a judicial question.

In this connection it is very ably argued that the agreement in question is in contravention of our Pennsylvania statutes. If this were true in fact, it would necessarily follow that the agreement must fall because void as against a declared statutory policy of the state, but no such statute has been called to our attention, nor does the agreement offend in terms or by necessary implication against any positive legislative enactment. It is argued that the corporation acts of 1874 and 1891 provide for annual elections by the stockholders, and so they do, but annual elections are held by the appellee corporation, and directors are annually chosen by the stockholders. The agreement in question in no way disregards the duty to hold annual elections, but, on the other hand, contemplates the holding of such elections.

It is further contended that the act of March 5, 1903 (P. L. 14), confirming the right to vote by proxy and providing that proxies dated more than two months prior to a meeting or an election shall not confer the right to vote, is in effect contravened by the agreement relied on by the appellees in the present case. In answer it may be said that no question of the right to vote by proxy arises in this case. It seems perfectly clear that the proviso referred to has reference to formal proxies given by a stockholder authorizing the person designated therein to vote his stock at a meeting or at an election. No proxy of any kind was given in the case at bar, and therefore the 60-day limitation has no application. In the present case, the persons in whose names the stock stands on the books of the company vote the same as they have the prima facie right to do under the express provisions of our statutes. The act of 1893 recognizes the right of a trustee to vote stock so held by him at elections of the company, and provides that, if the character of his trusteeship be not disclosed on the face of the certificate, how the question of his right to vote shall be determined. This act clearly contemplates, not only the right of a trustee to hold stock, but the power to vote it, and this is what was done in the present case.

But it is argued with great force by the learned counsel for appellant that, even if the agreement in question is not invalid as against

public policy, it is at all events revocable. We concede the weight of authority to be that the general policy of the law prohibits the separation of the voting power from the beneficial interest, and, to justify such a separation, there must be a property interest to conserve, some definite policy in the interest of the corporation to be carried out, some beneficial interest of the stockholders to be served, or some purpose not unlawful of an advantageous character to the stockholders to be effectuated. As we read this record and view the facts found by the learned court below, there was a property interest to conserve, a definite policy of the corporation in the interest of the stockholders to be carried out, and a lawful purpose beneficial to all concerned to be effectuated. This was the very purpose of the agreement, and the results seem to be a confirmation of the wisdom of the plan adopted. All of the cases turn upon the question whether the irrevocable trust is or is not coupled with an interest. If coupled with an interest, such agreements have been generally sustained, but, if not coupled with an interest, they are regarded as in the nature of a revocable power.

We think this is the turning point of the present case, and, after consideration, have concluded the learned court below properly held that, the power being coupled with an interest, the agreement is valid and binding upon the parties who entered into it. The beneficial interest is set forth in the eighth paragraph of the agreement, which gives the trustees the first right to purchase the stock of any contracting party who does not desire to continue the trust relation at double the par value of the same for the use and benefit of the remaining parties. We think this comes within the definition of a power coupled with an interest which has been held to be an interest in the subject upon which the power is to be exercised, or an interest in that which is produced by the exercise of the power. It cannot be doubted under the rule of all our cases that, if the parties to the present agreement had entered into a similar contractual relation as partners for the purpose of accomplishing the same results and with the view of continuing a business policy, the contracting parties would be bound by their covenants, and the contract would be enforced according to its terms. There does not seem to be any sufficient reason for the application of a different rule because, instead of binding themselves together as partners, the parties chose to adopt the more modern method of incorporation for the transaction of their business in an enterprise in the nature of a private trading corporation.

This view of the law was tersely expressed by Chief Justice Mitchell in Fitzsimmons v. Lindsay, 205 Pa. 79, 54 Atl. 488, where, in discussing the question of restraint of alienation arising under a somewhat similar agreement, it was said: "Such agreements are quite common among partners as to their shares in the firm assets, and are enforced by courts without hesitation. No reason of overruling public policy is apparent why they should not also be sustained in relation to shares

of stock in what is really only a private trading corporation." Agreements between the stockholders of a private trading corporation relating to the alienation, purchase, and sale of the shares of stock of contracting shareholders have been sustained by this court in two recent cases—Boswell v. Buhl, 213 Pa. 450, 63 Atl. 56; Boggs v. Boggs & Buhl, 217 Pa. 10, 66 Atl. 105. Our cases hold that a beneficial interest coupled with a power is a property interest, and as such is irrevocable. Smyth v. Craig, 3 Watts & S. 14; Blackstone v. Buttermore, 53 Pa. 266; Fitzsimmons v. Lindsay, 205 Pa. 79, 54 Atl. 488; Wood v. Kerkeslager, 225 Pa. 296, 74 Atl. 174; Garrett v. Lawn Mower Company, 39 Pa. Super. Ct. 78.

In addition, it may be said that, under the present agreement, there is something more to be considered than the mere abstract legal question of power to vote stock coupled with a beneficial interest. The agreement contains all the essential elements of an active trust and the trustees have not only been charged with active duties, but they have performed, and are performing, these duties in the interest of the corporation and for the benefit of the stockholders. They give their services without compensation in the interest of all concerned, and it seems to be conceded that the management is competent and the business policy intended to be continued under the agreement highly satisfactory. No question of fraud, mistake, or misapprehension has been raised, nor has even a suggestion been made reflecting upon the management. No stockholder is complaining about the management, and no question has been raised respecting the rights of minority stockholders. The appellant purchased his stock with full knowledge of the agreement, and took it impressed with the trust. He is not a purchaser without notice, and, if the agreement is valid, he is bound by its terms.

We do not agree with the contention of appellant that the option to purchase is not such a substantial interest as will support the trust, especially in view of the fact that the trustees during the period in which the right to purchase runs have active and important duties to perform in the interest of all the contracting parties. Nor is the argument sound that the option is invalid because contingent. In a sense all options are contingent because they may or may not be exercised within the time or upon the conditions stipulated. An option is a unilateral agreement binding upon the party who executes it from the date of its execution and becomes a contract inter partes when exercised according to its terms. Optional agreements have been before this court for construction in several recent cases, and the right of parties to make them and the power of courts to enforce them if exercised according to their terms have always been sustained. Barnes v. Rea, 219 Pa. 279, 68 Atl. 836; McHenry v. Mitchell, 219 Pa. 297, 68 Atl. 729.

There is no substantial merit in the contention that the contract lacks mutuality of parties, and is without consideration. Decree affirmed, at the cost of appellant.[19]

III. Dividends

PRATT et al. v. PRATT, READ & CO.

(Supreme Court of Errors of Connecticut 1866. 33 Conn. 446.)

Bill for an injunction, brought to the superior court for Middlesex county. * * *

Upon the bill and the answer of the respondents the court found the following facts:

The respondents, a joint stock corporation under the name of Pratt, Read & Co., was on the 6th day of October, 1863, duly organized and located in the town of Meriden and county of New Haven, with a capital of $175,000, divided into seven thousand shares of $25 each, for the "purpose of manufacturing, selling, and dealing in all kinds of ivory, shell, horn, bone, rubber, wood and other combs, all kinds of piano and melodeon ivory, and other articles made in whole or in part of ivory, shell, bone, india rubber, gutta percha, composition, wood or metal, and to purchase, hold, sell, and deal in all real and personal estate necessary and convenient for the prosecution of said business, and generally to do all acts connected with or incidental to said business or the prosecution of the same." The stockholders of the corporation are exclusively composed of the former members of the firms of George Read & Co. and Pratt Brothers & Co., late of Saybrook, in Middlesex county, and the stockholders in the former corporation of Julius Pratt & Co., late of Meriden. The petitioners are the former members of said copartnership of Pratt Brothers & Co., and now own 1,441 shares of the stock. The remaining 5,559 shares are owned and held by those individuals who formerly composed said copartnership of George Read & Co. and said corporation of Julius Pratt & Co. One of the principal objects in the formation of the new corporation by the consolidation of said copartnerships and corporation, was to secure as far as practicable uniformity in prices, and certainty in profits, and to that end it was understood by all concerned that the respondents were not to receive and be prejudiced by any competition from any of its own stockholders, and that they should not carry on the same business independently of the business of the respondents.

In June, 1864, Ulysses Pratt, one of the petitioners, purchased from the Deep River Ivory Comb Company, a corporation located in Saybrook, their factory, machinery, fixtures and privileges, and in February or March, 1865, formed a copartnership with other persons, and

[19] Compare Warren v. Pim, 66 N. J. Eq. 353, 59 Atl. 773 (1904).

commenced and still carries on thereat the business of manufacturing ivory combs, and sells their manufactured goods in competition with the respondents.

At the time the respondents were organized, the real and personal assets of the corporation of Julius Pratt & Co. and of the copartnerships of George Read & Co. and Pratt Brothers & Co., was appraised by persons mutually selected at $446,000, which was held in the following proportions, to wit: by Julius Pratt & Co. $258,511, by George Read & Co. $89,593, and by Pratt Brothers & Co. $97,917; and in the subscriptions to the capital stock of the respondents the members of said corporation of Julius Pratt & Co. and of said copartnerships of George Read & Co. and Pratt Brothers & Co., subscribed and owned in the same proportions. The remainder of the real and personal estate of said corporation and copartnerships, amounting to $271,000, after deducting and applying the capital of the respondents, $175,000, was taken by the respondents, and the notes of the new corporation given, in the same proportions that the stock was subscribed, to said corporation of Julius Pratt & Co. and said copartnerships of George Read & Co. and Pratt Brothers & Co. All the notes so given to George Read & Co. and Pratt Brothers & Co. were paid at maturity, and all those given to said corporation of Julius Pratt & Co. had been paid at the time of the bringing of the suit, except about $36,000, which for the accommodation and convenience of the respondents had been extended and allowed to remain over-due.

At the time of the organization of the new corporation there was a general understanding by the parties that the notes should be paid at its convenience, and that they should be extended to suit its convenience in the reasonable prosecution of its business, and that the payment of these notes to the holders should be received by them in lieu of dividends, until they were all cancelled and discharged; but the petitioners Alexis Pratt and Felix A. Dennison were not cognizant of and did not participate in that understanding, and it did not clearly appear that the other petitioner, Ulysses Pratt, did.

At the time of the bringing the petitioners' bill, to wit, on the 8th of March, 1866, the outstanding indebtedness of the respondents was about $72,000, of which $30,000 was matured and had been extended as aforesaid, and the respondents had then on hand in cash $21,000, and a surplus of property and earnings including said cash of about $130,000. This surplus, aside from said $21,000 in cash, consisted of stock, manufactured goods, and some $50,000 in paper, taken on short time, upon the sales of manufactured goods at their agency in New York. The amount and value of the respondents' surplus was arrived at by an inventory and estimate of its assets made, so far as that portion which consisted of manufactured goods was concerned, at 28 per cent. below the selling prices in market.

The building now in process of erection by the respondents in Say-

brook is designed for the manufacture of piano key boards, a business incidental to the manufacture of piano keys, and, if carried on to a considerable extent by the respondents, requires the additional room and power and expenditure contemplated in the building and improvements which the respondents have commenced to erect and make, and which, with the machinery and fixtures, and the necessary additional outlay in lumber and materials, will call for some $30,000 or $35,000.

The directors of the corporation at the time of its organization contemplated the prosecution in some manner of this branch of business, and the said Ulysses Pratt was then and for some time thereafter one of its most earnest advocates; but the petitioners have never been in favor of conducting it at so great expense, or so as to interfere with the payment of fair and reasonable dividends; and the successful prosecution of the business has not yet been fully established, and at the time of the commencement by the respondents of said building, and at other times since, the petitioners have objected to and remonstrated with the directors, and insisted upon having their share of the earnings of the corporation paid to them, and the said Alexis Pratt has little other means or source of income for the support of himself and family, and needs whatever justly belongs to him as the avails of his stock and interest in the corporation.

The corporation has made no dividends since its organization, except one of five per cent. in July, 1865, which was declared for some purpose connected with the United States income tax; and at the same meeting at which the dividend was declared, the said Ulysses Pratt, acting for himself and as agent of the other petitioners, desired and moved a dividend of forty per cent., which motion was rejected.

The business of the corporation has from its organization been and still is very prosperous, but it has not cash funds to pay its debts, erect and make the contemplated buildings, improvements and expenditures, and pay a dividend; and if it assumes or undertakes to do all these at present it must either borrow money to a considerable amount or force the sale of its manufactured goods at a loss; but if the erection of the new building and the prosecution of the piano key board business is abandoned, it can safely make a liberal dividend from its accumulated profits. Its property cannot be forced upon the market and disposed of faster than by its regular sales at its agency in New York without material sacrifice, and the present tendency in the prices of its goods is somewhat downward, partly in consequence of sales at under prices made by Pratt Smith & Co., a corporation of which the said Ulysses Pratt is a member and agent, and partly from other causes connected with the business of the country; and to conduct the business successfully a large capital in said material and manufactured goods is necessary, and a much larger sum than $175,000 is required, unless a considerable amount in surplus can be retained and

employed for that purpose. The corporation, through its directors, has acted in the premises without malice, improper motive or fraud towards the petitioners or either of them, and in the management of its business and concerns has exercised what they believed to have been a sound and reasonable judgment and discretion.

Upon these facts the case was reserved for the advice of this court.[20]

HINMAN, C. J. The petitioners seek in this case the aid of a court of equity to compel the respondents, a joint stock corporation, to declare and pay over to its stockholders a reasonable dividend out of its surplus earnings; and also to enjoin it from making farther expenditures in the erection of a large factory building for the purpose of enlarging its business and thereby exhausting its surplus funds, to the injury of the petitioners, who are a minority of its stockholders opposed to such enlargement. The petitioners make in their petition a very strong case for the equitable interference of the court in their behalf. And if it had been sustained by the facts found by the court, we could have no hesitation in granting them the relief asked for. Where a corporation is about to exceed its powers by applying its property to objects beyond the authority of its charter, it is well settled that a court of equity will grant relief to a minority of its stockholders who dissent from such use of its funds. Railroad Co. v. Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; Stevens v. Railroad Co., 29 Vt. 545; Sears v. Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557; Scofield v. School Dist., 27 Conn. 499.

Indeed this doctrine necessarily results from the principle which underlies the cases, that the corporation and its directors are trustees, and as such may be called into a court of chancery, either for an account, or to restrain them from mismanagement of the corporate property, especially for a fraudulent mismanagement of it, or for the purpose of compelling the corporation and its directors to declare dividends from its surplus earnings, where such dividends are needlessly and improperly withheld. Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Scott v. Insurance Co., 7 Paige (N. Y.) 198. Indeed, joint stock companies in modern times are nothing but commercial partnerships, which have taken the form of corporations for the greater facility of transacting business, and to prevent a dissolution of the concern by those numerous events which are so liable to work a dissolution in a partnership composed of a great number of individuals; and they must have applied to them principles making them accountable like all trustees, or the grievance would be intolerable, since otherwise a majority of the stockholders, acting through the directors, who would thus cease to be in fact what the law considers them,—the agents of the whole body of stockholders,—and would become the private agents of the majority, might set the minority at

[20] Statement of facts abridged.

defiance, and manage the affairs for their own supposed benefit and the benefit of the majority who appointed them.

The true doctrine upon this subject appears to us to be very fairly and correctly stated by Chancellor Walworth in the case of Scott v. Insurance Co., 7 Paige (N. Y.) 203, where he says, that "as the directors are bound to exercise a proper discretion in making dividends of surplus profits, if they abuse that power by dividing the unearned premiums without leaving sufficient to satisfy the probable losses, they may, in case of an extraordinary loss which is sufficient to exhaust the whole capital and more, make themselves personally liable to the creditors of the company. On the other hand, should they without reasonable cause refuse to divide what is actually surplus profits, the stockholders are not without remedy, if they apply to the proper tribunal before the corporation has become insolvent." The surplus of this corporation over its nominal capital which the petitioners seek to have divided is so large, and bears so great a proportion to the capital, that we have felt the necessity of stating our views of the principle which should govern in determining questions of this sort the more distinctly, in order to prevent the case from being used as a precedent against ordering a dividend to be made, where there is confessedly a large surplus over the capital on hand, and no reason can be given for withholding it from the stockholders except the mere will of the directors, acting by the advice of a majority of the stockholders.

In cases of this description the question must always be, where a surplus is asked to be divided, and the directors refuse to declare a dividend, whether there is a reasonable cause for withholding it. Now, in the first place, before a dividend is ordered to be made, it should appear clearly that there is a surplus to be divided. In this case the surplus appears to be very large in reference to the nominal capital of the company; but when examined in reference to its actual capital, it is otherwise; and we think we find a sufficient reason in this fact for not ordering a dividend. In the first organization of the corporation the sum of $175,000 was named as the nominal capital in the articles of association. But it is evident from all the facts in the case that the actual capital was much larger and consisted of all the property purchased of the individual stockholders, who had all been engaged in the business contemplated to be carried on by the company, which was of the agreed value of more than $400,000; the difference being made up to the stockholders by the corporation notes, which were expected to be paid, as they principally have been, out of the subsequent profits of the business, and not by an immediate sale of any large portion of the assets thus purchased of its stockholders.

It could not have been the intention to force the sale of this large amount of property. This could not have been done without great sacrifice, and if such had been the intention, the corporation never

would have purchased it. They therefore must have intended to use it as a part of their capital, or to keep it on hand as surplus until that part of it which consisted of manufactured goods could be sold, in the regular course of business, with which all the stockholders were familiar. There is no evidence that they have not converted their manufactured goods into cash as fast as it can be done in the successful prosecution of their business, and to order them to do it faster than this is simply to order them to make needless sacrifices. The reason for stating the amount of their capital at so much less than it actually was does not appear, and it is not very important that it should. It is enough to say of it, that while it is not a course to be recommended for general adoption, the finding in this case is very full to the effect that nothing improper or fraudulent was intended by it; and the success of their business fully sustains the finding, that the directors have in all their transactions exercised a sound judgment and discretion.

Again the court finds that it was the general understanding of the stockholders that their notes against the corporation, given for the largest part of the property purchased at the time of the organization, as they should be paid, should be regarded and received by them in lieu of dividends, which implies certainly that no dividends should be declared until that large indebtedness was paid; and this has not yet been done, by some thirty thousand dollars. But there was as much reason for declaring a dividend when the corporation was first organized as there is now, except so far as the comparatively small sum in cash on hand is concerned. As then the business appears to have been honestly and discreetly managed, and as it is found moreover that to conduct it successfully requires a much larger capital than $175,000, unless a considerable surplus is retained, and as we believe it to have been the intention of the stockholders in the organization of the company to retain a surplus to at least the amount of its capital for that purpose, and as the ordering of a dividend would necessarily involve the sacrifice of a large amount of manufactured goods at a forced sale, it appears to us that it would be very inequitable and unjust to the managing majority to advise the superior court to order such a dividend to be made.

The remaining question is, whether the corporation ought to be restrained from erecting their new factory, for the manufacture of piano key boards. The directors at the time the corporation was organized contemplated the prosecution of this business. The articles of association state the purpose of the organization to be to manufacture, sell and deal in all kinds of ivory, shell, horn, bone, rubber, wood and other combs, and all kinds of piano and melodeon ivory, and other articles made in whole or in part of ivory, shell, horn, bone, India rubber, gutta percha, composition, wood or metal, and to purchase, &c., and to do all acts connected with or incidental to the said

business or the prosecution of the same. It is not very strenuously claimed but that the manufacture of piano key boards, as connected with the manufacture of all kinds of piano ivory, and especially of all other articles made in whole or in part of ivory, composition, wood or metal, comes within the contemplated purpose of the corporation, as expressed in the articles. The question, therefore, in this part of the case, is confined merely to whether the contemplated expenditure for this new factory is so great as unnecessarily and unreasonably to hazard the petitioners' stock.

On a question of this sort much must necessarily be left to the discretion of the managing directors, and so long as they keep within the objects contemplated by the articles of association, and the expenditure is not unreasonable in reference to the amount of their capital, a court of equity ought very seldom to interfere with them. In the organization of these companies, parties, if they see fit to do so, can provide specifically as to the business that shall be transacted; and if they omit to do this, but, on the contrary, express the purposes of the organization in such general terms as to admit of a very large discretion in the management of their business, the presumption is that it was intended that the discretion of the managers in this respect should be unlimited. There is nothing in the articles here that shows any intention to limit the discretion of the managers in respect to the particular business contemplated, except it be the naming of a sum as the amount of the capital. This in most cases would and ought to be some guide in respect to the amount that it would be reasonable to expend in permanent fixed property and machinery; but this, in this case, appears to have been fixed without much reference to the amount of business to be done. We feel therefore that it is impossible for us to say that the expenditure of some $35,000 for this new factory is so clearly extravagant and disproportioned to the amount of capital stock as to justify the court in enjoining against it. We therefore advise the superior court to dismiss the petitioners' bill.

In this opinion the other judges concurred, except CARPENTER, J., who, having heard the case upon a motion to dissolve the injunction in the court below, did not sit.[21]

[21] In Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162 (1885), it was held that, where the stock of an insolvent corporation had been assigned to the creditors to hold until the debts due had been realized out of the "net profits," the directors were bound to make a distribution of such profits when realized.

BEERS v. BRIDGEPORT SPRING CO.

(Supreme Court of Errors of Connecticut, 1875. 42 Conn. 17.)

Bill in equity to compel the respondents, a joint stock corporation, to pay over certain dividends claimed to have been declared by the directors, brought to the Superior Court in Fairfield County. The following facts were found by the court:

On the 29th day of March, 1864, the Bridgeport Spring Company was organized as a joint stock company, with a capital stock of $20,000. which it increased in the manner required by law in November following to the sum of $30,000. The company went on in the business for which it was organized, making earnings and paying dividends as hereinafter stated.

At a meeting of the board of directors, held July 11th, 1866, they declared the first dividend of the company, one of 15 per cent., payable January 1st, 1867. This dividend was paid when due.

At a meeting of the directors, held July 13th, 1866, it was voted "To declare a further dividend of 26 per cent.; the amount to be placed, pro rata, to the credit, on the books of the company, of each stockholder, and made payable, without interest, at such time as may by the directors be ordered." At a meeting held July 15th, 1867, it was voted "That the balance due on last year's earnings, 26 per cent. dividend declared, be made payable January 1st, 1868," and the dividend was paid at that time.

At the same meeting of the directors they passed the following resolution: "To declare a dividend of 70 per cent. on the capital stock of this company; amount of said dividend to be placed, pro rata to the credit, on the books of the company, of each stockholder, and made payable, without interest, at such time as may be directed by the board."

Dividends were afterwards declared by the directors in the same terms as this last resolution, as follows: July 15th, 1868, one of 40 per cent.; July 19th, 1869, one of 25 per cent.; July 18th, 1870, one of 10 per cent.

During the same time the following dividends were declared in cash and paid by the corporation, viz.: July 15th, 1868, one of 15 per cent., out of the earnings of 1867; June 26th, 1869, one of 15 per cent., also out of the earnings of 1867; both which dividends were paid out of the 70 per cent. set apart July 15th, 1868. Also July 13th, 1872, one of 10 per cent. which was duly paid; and July 12th, 1873, one of 6 per cent., to be taken out of the 70 per cent. before mentioned and payable on the 1st of January, 1874. The payment of this last dividend has been twice postponed, and is still unpaid, because the directors have not deemed it advisable to take the funds necessary therefor from the business.

At a meeting of the directors, held on the 13th day of July, 1872, the following resolution was passed:

"Resolved, That 115 per cent. of the earnings of this company previous to July 1, 1870, and now standing credited, pro rata, to each stockholder, and subject to the direction of the board of directors, shall be taken from the account of each stockholder, pro rata, and carried to an account to be known as a surplus fund account."

And at a subsequent meeting of the board, held on the 16th day of September, 1872, the following resolutions were passed:

"Resolved, That dividends shall hereafter be made as soon as the money in the hands of the company shall, in view of the needs of the company, warrant.

Resolved, That all dividends hereafter made, shall be declared from the account known as the surplus fund account, till the full amount of 115 per cent. on the capital stock be paid."

The corporation has made the profits or earnings represented by said sum of 115 per cent. of its capital, which has, from time to time, been invested in improvements upon real estate, and in machinery, tools, fixtures and material, in the opinion of the directors advantageous to the business of the corporation.

There are in Bridgeport other corporations organized for and carrying on the same business, that have larger capital than the one in question and a very favorable reputation, and this corporation, in the opinion of the directors, has been better able, by means of the property now in its control, to successfully compete with these corporations.

If the respondents are compelled to pay, within a comparatively short time, the whole of the 115 per cent. to the stockholders, the corporation will be required to contract its business and encumber its property to such an extent as would be seriously injurious to and perhaps destructive of its credit and business.

In the adoption of the resolutions of the board of directors, passed at meetings held on the 13th of July, 1872, and on the 16th of September, 1872, the object was to keep that account in such form as would show to the stockholders at each annual meeting how much of the 115 per cent. was still unpaid to the stockholders, and to simplify the keeping of the books.

The company never had, since July, 1868, in actual money, at any one time, more than sufficient to carry on its ordinary business and to pay the dividends that have been ordered paid; and when a cash dividend has been paid, the company has found it necessary to borrow some money on accommodation paper from the banks, to enable it to meet its obligations with promptness.

The 115 per cent. was, and has been continued to be, invested, as its several portions were from time to time earned, in real estate, in improvements upon such real estate, in machinery, tools, fixtures, and material required and needed in properly carrying on the business, and has in no wise been changed in its use or appropriation, at the time of

or since the adoption of the resolutions aforesaid; nor has the amount been impaired or lost, but exists in the form of the investment stated.

The directors have acted in good faith and in the belief that the action taken by them was for the interest of the company and its stockholders.

The whole number of shares into which the capital stock of the company was divided is twelve hundred, of which the petitioners owned 360 at the time the suit was brought. Since then Wheeler Beers, one of the petitioners, has sold his stock, but, in making the sale, he reserved to himself all such dividends as had, prior to the bringing of the suit, been declared by the directors.

The vote of the directors, passed July 15th, 1867, was reported to the meeting of the stockholders, held afterwards on the same day, and approved by them by a formal vote. The vote of the directors, passed at their meeting held July 13th, 1872, by which they directed the 115 per cent. to be "carried to an account to be known as a surplus fund account," was passed without the knowledge of those of the stockholders who were not included among the directors, and without the knowledge of any of the petitioners.

The entire earnings of the company, unexpended in dividends actually paid over, and existing at their statement in July, 1872, was about 131 per cent. of the capital stock, and at the statement in July, 1873, 155 per cent. of such capital; all of which earnings were invested in real estate, improvements thereon, tools, fixtures, material and accounts and cash, the item of cash then on hand amounting to the sum of $718.11.

The petitioners, prior to the bringing of the petition, caused to be delivered to the president and directors of the company the following request in writing, which was signed by all the petitioners by their attorney:

"Bridgeport, February 17th, 1873.

"To the President and Directors of the Bridgeport Spring Company: Gentlemen—The undersigned, stockholders of said company, hereby request you to restore to the stockholders thereof the earnings of said company with which said stockholders had been credited previous to July 1st, 1870, amounting to 115 per cent. of the capital stock, and which had been declared as dividends to the said stockholders before that time, and taken from them by a resolution of said directors, passed July 13th, 1872, and to the condition they were in prior to the passage of said resolution. They also request you, without delay, to pay over to them their respective shares of said earnings as dividends before declared to them."

Upon these facts the case was reserved for the advice of this court.

PARDEE, J. When the defendant corporation, by the legal votes of its directors, declared the dividends in question from profits theretofore earned and received, made the same payable without interest at such time as might be directed by the board, and ordered the amount

to be placed pro rata to the credit of the stockholders upon its books, the share of each stockholder in the several amounts was thereby severed from the common funds of the corporation and became his individual property. Thenceforth the company owed him a debt, payment of which at a proper time he might demand, and upon refusal, enforce by the aid of a court of equity. King v. Paterson & Hudson River R. R. Co., 29 N. J. Law, 504; Redfield on Railways (1st Ed.) 240, 597; Le Roy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657. The proviso as to the time of payment does not absolve the company from all obligation to him; there remain all the essential elements of a debt, certain in amount, and certain to be paid upon a day not yet appointed, but which it is the duty of the debtor at some time to name. The legal effect of the vote is that the debt is to be paid within a reasonable time. The corporation, having declared that it had received for and owed to each stockholder a certain sum of money, and having set the same apart from its own funds for his sole and separate use, cannot thereafter nullify its votes or repudiate its obligations by declining to pay the dividend or to name any time when it would pay it.

The interests of each stockholder, so far forth as the share of the profits set to him as a dividend is concerned, become not only several and distinct from, but positively adverse to, those of every other stockholder and of the corporation itself, and the directors cease to represent him in relation thereto and cannot dispose of or deal with the same in any manner without his authority or consent. As between the corporation and the petitioning shareholders, therefore, the vote of July 13th, 1872, could in no manner affect their right to dividends theretofore declared and placed to their credit, unless they gave actual or constructive assent thereto. As the result of the vote, that which previously stood upon the books of the corporation as a debt due from it to the stockholders, assumed the form of an addition to its surplus fund. An intending purchaser of stock who should examine these books for the purpose of learning the financial condition of the company might be misled as to the amount of its assets and consequently as to the value of its shares, and each stockholder who assents to this change in the statement of the corporation accounts in reference to himself, might under certain circumstances be estopped from asserting his right to any portion of the surplus fund as a dividend declared.

The finding of the court is, that if the corporation is compelled to pay, within a comparatively short time, the whole amount of unpaid dividends, it will be required to contract its business and encumber its property to such an extent as would seriously injure, and perhaps destroy, its credit and business. While there is not sufficient force in this fact to induce us to deny all relief to the petitioning minority of shareholders, it requires us to be cautious as to the manner in which relief shall be granted. We must keep in mind the financial condition

of the company at the time of declaration of the dividends and the language of the votes respecting the payment thereof.

These dividends are based upon profits actually earned and received; these profits came from time to time into the treasury of the corporation in the form of money; this money has been expended for such purchases of additional real estate, machinery and materials, as in the judgment of the directors would promote the best interests of the company; and in that form of investment these profits now exist. The directors in the exercise of their discretion made an estimate as to the amount of the surplus profits of the corporation, looking at the assets as they actually existed, and upon a balance thus drawn declared, as they had a right to do, the dividends in question.

In Scott v. Eagle Fire Ins. Co., 7 Paige (N. Y.) 203, Chancellor Walworth says, that if directors "without reasonable cause refuse to divide what is actually surplus profits, the stockholders are not without remedy if they apply to the proper tribunal before the corporation has become insolvent." In Pratt v. Pratt & others, 33 Conn. 456, our own court said that joint stock companies "must have applied to them principles making them accountable like all trustees, or the grievance would be intolerable, since otherwise a majority of the stockholders, acting through the directors, who would thus cease to be in fact what the law considers them, the agents of the whole body of stockholders, and would become the private agents of the majority, might set the minority at defiance and manage the affairs for their own supposed benefit and the benefit of the majority who appointed them."

Therefore, as there can be such a condition of things as will justify a court of equity in compelling directors to declare a dividend contrary to their judgment, of course circumstances may justify the court in compelling them to pay dividends which they have voluntarily declared.

One of the dividends in question was declared and credited to the stockholders more than seven years since, another more than six, a third more than five; the rust of interest meanwhile consuming them; and yet the respondent majority still refuses to indicate any time of payment even in the distant future; practically claiming the right to retain them as long as they can profitably use borrowed money for which they pay no interest. In this they have failed to meet the reasonable expectations, or recognize the equitable rights of the minority.

By an usage or custom which is as well established as if it stood upon legislative enactment, corporations steadily earning profits are expected to divide a portion of the same. Most of them make a division at least annually. A division declared imports payment thereof within a reasonable time. Indeed, in the mind of the purchaser of shares investment and dividends are so closely associated as are seed time and harvest in the thoughts of the husbandman. And this un-

written law of the commercial world influences us somewhat in the determination of the case at bar.

One of the petitioners has sold his stock, reserving the declared dividends, and has no further or other interest in the prosperity or even existence of the corporation.

We think that the majority cannot equitably, compel the minority to loan money to the corporation without interest in the form of dividends declared and withheld, beyond the earliest time when they can be paid without serious injury to the company. And in saying this we are not unmindful of the fact that during the time these dividends have been retained the directors have declared and paid to such persons as have continued to be shareholders, other dividends from their profits to a percentage larger than the ordinary rate of interest upon money loaned. This indeed indicates successful management thus far. This success however should not cause us to overlook the rights of the stockholders in reference to other dividends declared and unpaid. They have thus long borne the risks attendant upon the business; they are entitled to reap the profits.

But the finding does not present the details of the present investments of the corporation with sufficient particularity to enable this court safely to name a day for the payment of the declared dividends to the petitioning stockholders. We therefore advise the Superior Court to ascertain, upon further hearing to be had for that purpose, at what time or times the same can be paid without serious injury to the corporation and to decree accordingly. We also advise the Superior Court to decree that the corporation shall, by its duly authorized agents restore the dividends so declared by its directors and received by it from the credit of the stockholders, to the condition they were in when credited to the stockholders prior to the vote of July 13th, 1872.

In this opinion the other Judges concurred.[22]

KING et al. v. PATERSON & H. R. R. CO.

(Court of Errors and Appeals of New Jersey, 1861. 29 N. J. Law, 504.)

THE CHANCELLOR. The action is brought to recover the amount of two dividends, declared in January and July, 1857, upon two hundred shares of the capital stock of the corporation owned by the plaintiffs. The dividends were made payable at the branch office of the Ohio Life Insurance & Trust Company, in the city of New York, the trust company being appointed registers of the railroad company to transfer stock and to pay dividends. Notice of the dividends and of the time and place of payment was published in

[22] **Compare: Ford v. Easthampton Rubber Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462 (1893); Lagunas Nitrate Co., Ltd., v. Schroeder & Co., 85 L. T. R. 22 (1901).**

a newspaper printed and published in the city of New York. The money to pay the dividends was deposited by the defendants in the office of the trust company, before the day of payment of each of said dividends, ready to be paid to the plaintiffs on their application. The money was left in the hands of the trust company until the 24th of August, 1857, when the company failed, and the money was lost.

After a dividend is declared, all community of interest in relation to such dividend, as between the stockholders themselves and between the stockholders and the corporation, is at an end. The right of a party to whom the dividend is payable is recognized as a separate and independent right, which may be enforced as against the corporation. Davis v. Bank of England, 5 Barn. & Cress. 185; Coles v. Bank of England, 10 Ad. & E. 437; Carlisle v. South Eastern Railway Co., 6 English Rail. Cas. 685; 1 Shelf. on Rail. 205.

This principle was fully recognized in Le Roy v. Globe Insurance Co., 2 Edw. Ch. (N. Y.) 657, although the precise character of the relation subsisting between the stockholder and the corporation in respect to the dividend was not clearly defined. In the opinion of the Vice Chancellor, if payment of the dividends declared is withheld by a solvent corporation, payment may be enforced at the instance of the stockholders by mandamus, by suit at law on behalf of individual stockholders for the payment of the money, or by bill in equity to obtain possession of the money as a trust fund, which the corporation were bound to distribute, and over which they had no other control. In that case, the company being insolvent, it was held that the money appropriated and set apart for distribution among the stockholders by way of dividend became a trust fund in the hands of the corporation, to which the stockholders, as individuals, had acquired vested rights, and that they consequently were entitled to the fund in preference to the creditors of the corporation.

In Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417, Chancellor Kent held than an action at law for money had and received would lie by a stockholder against a corporation for the recovery of a dividend, and that it was not such an express trust as would take the case out of the statute of limitations.

The true principle is, that the dividend, from the time that it is declared, becomes a debt due from the corporation to the individual stockholder, for the recovery of which, after demand of payment, an action at law may be maintained. State v. Balt. & Ohio Railway, 6 Gill (Md.) 363; Phil., Wil. & Balt. Railway v. Cowell, 28 Pa. 329, 70 Am. Dec. 128; Ohio City v. Cleveland & Toledo Railway, 6 Ohio St. 489.

Like any other debt, it may be set off against the debt of the stockholder to the corporation. Bates v. New York Insurance Co., 3 Johns. Cas. (N. Y.) 238; Rogers v. Huntingdon Bank, 12 Serg. & R. (Pa.) 77.

It may be, by banking corporations, sometimes carried to the general account of the stockholder with the corporation, and is thus applied in adjusting balances between the parties or in satisfying the claims of the corporation against the stockholder. They thus act in the character not of trustees, but of debtors. The fund is dealt with not as a trust fund, but as money due. And why should it not be so regarded? What principle is violated? Does not sound policy require that the relation between the stockholder and the corporation in relation to the dividend should be simply that of debtor and creditor; that the stockholder should have his remedy at law, and that the corporation should be permitted to apply it by way of set-off to satisfy demands against the stockholder?

Why is the case distinguishable in principle from that of a stockholder who is also a depositor? The dividend and the deposit are alike debts due from the corporation to the stockholder. Both are in the keeping and under the control of the corporation with the assent and concurrence of the stockholder. It has been repeatedly decided that an action lies for a deposit by a depositor against a corporation after demand. The fact that he is a member of the corporation cannot vary the principle. Downes v. Phœnix Bank of Charlestown, 6 Hill (N. Y.) 297; Watson v. Phœnix Bank, 8 Metc. (Mass.) 217, 41 Am. Dec. 500.

In a limited sense, the deposit and the dividend in the hands of the corporation are alike trusts. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee. Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 110, 11 Am. Dec. 417; Scott v. Surman, Willes, 404. In this limited sense, and in no other, the corporation is a trustee of the dividend unpaid to the stockholder.

The debt is strictly demandable and to be paid at the office of the corporation. Admitting the right of the corporation to make it payable elsewhere, it must be done at the risk of the corporation. The debtor has no right, without the consent of the creditor, express or implied, to intrust a third party with the fund for the purposes of payment. The trust company with whom the funds were deposited for payment was the agent of the corporation, not of the stockholders; of the debtor, not of the creditor. If the agent prove faithless, or the fund is lost in his hands, the loss must fall upon the owner. The deposit was made in the name of the corporation, and was subject to their control. There is nothing in the special verdict that shows a consent, express or implied, on the part of the plaintiffs to their funds being intrusted to, or deposited with, the Ohio Life & Trust Company.

Strong considerations in support of this conclusion may, perhaps, as was urged upon the argument, be derived from the peculiar pro-

visions of the charter of the railroad company, as well as from the policy of the law, which would deny to a corporation within this state the right to deposit moneys due to its creditors in the hands of a foreign corporation. But the decision is designedly based upon the sole ground, that after a dividend is declared, it becomes a debt due from the corporation to the stockholder as an individual, and that the selection of an agent for the payment of that debt by the debtor without the concurrence of the creditor must be at the risk of the debtor alone. The fund remains the property of the corporation until payment is made. If a loss is sustained, it falls upon the owner.

The judgment must be affirmed.[28]

CHAFFEE v. RUTLAND R. CO. et al.

(Supreme Court of Vermont, 1882. 55 Vt. 110.)

VEAZEY, J. The Rutland & Burlington Railroad Company had two mortgages resting upon its property, and the road was in possession of, and being operated by, the trustees of the second mortgage bondholders. The trustees of the first mortgage bondholders had brought suit to foreclose that mortgage. While this suit was pending the bondholders under the second mortgage obtained an act of incorporation under the name of the Rutland Railroad Company, for the purpose of "holding, maintaining and operating" said Rutland & Burlington Railroad, and in July of that year, 1867, the company was organized. Under the authority of the eighth and ninth sections of the charter and for the purpose therein named; and under the circumstances detailed in the referee's report, the defendant by corporate vote, issued prior to February, 1872, "preferred or guaranteed stock, commonly called preferred guaranteed stock," to the amount of $4,300,000. The company had also issued common stock to the amount of $2,500,000. February 1, 1872, the company made its first issue of certificates of "scrip dividend," specified therein as being "in settlement of dividends on the preferred guaranteed stock." Thereafter from time to time the company continued to issue similar certificates, but varying somewhat in their terms. The plaintiff having become the owner and holder of such certificate of different issues to an amount of over $21,000, and having demanded an exchange into the bonds of the company referred to in the certificates, and the company having refused to make the exchange, and then having demanded payment and been refused, brought this suit declaring in the common counts in assumpsit, to recover the amount of his certificates.

The plaintiff was a preferred stockholder from June 4, 1872, to Oc-

[28] See same case in lower court, 29 N. J. Law, 82 (1860). Compare Hunt v. O'Shea, 69 N. H. 600, 45 Atl. 480 (1899), and Petition of Le Blanc, 14 Hun (N. Y.) 8 (1878).

tober 9, 1877, and during this time purchased the certificates in suit and others, and had issued to him certificates on his own stock. The referee gives a statement of the floating debt of the defendant at yearly and half yearly intervals, beginning August 1st, 1868, and ending August 1st, 1879, and says these were the balances of the bills payable as shown by the treasurer's books at the several dates named, which both parties treated as a fair representation of the floating debt of the defendant.

The referee finds that if the floating debt and current expenses were to be first paid out of rent or income, the defendant has had no funds with which to pay the plaintiff's certificates, and had none at the time the demands were made and this suit brought. If the preferred stock was entitled to be paid dividends before the floating debt was paid, the income of the company at the time of the demands had been sufficient to pay all such certificates issued by the defendant. The road was leased before the certificates were issued and its sole income was from rents.

The defendant claimed before the referee and now insists that it never had income or earnings out of which a dividend could properly be made at the time when any of the scrip certificates were issued, and that the certificates were issued without authority and without consideration and are not binding on the defendant.

I. A primary question on the facts reported is: Which has the first right to the income, the creditors of the defendant company, or the preferred stockholders? The provision of the charter, section 8, is, that the preferred or guaranteed stock shall be entitled to dividends from the earnings or income of the corporation before any other dividend shall be paid.

The construction of similar provisions has not unfrequently been involved in causes in this country and in England, and the struggle has been to gain for the preferred guaranteed stockholders the double advantage of a shareholder and creditor, but without success. The legislation in this State and elsewhere has been in accord with the idea developed in the reported cases, that the stock and property of a corporation is a trust fund pledged for the payment of its debts, and the creditors' right to payment and their lien is prior to the right of every stockholder. In the late case of National Bank v. Douglass, 1 McCrary, 86, Fed. Cas. No. 14,375, the court say "sacredly pledged," and quoting the language of Judge Clifford in Railroad Co. v. Howard, 7 Wall. 392, 19 L. Ed. 117, adds that "stockholders are not entitled to any share of the capital stock nor any dividend of the profits until all the debts of the corporation are paid." To similar purport and equally strong is the language of Judge Story in Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944, and again in Mumma v. Potomac Co., 8 Pet. 286, 8 L. Ed. 945, and of Judge Curtis in Curran v. State of Arkansas and Others, 15 How. 304, 14 L. Ed. 705. See also the numerous cases in defendant's brief on this point.

It is now well established that dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends; Pierce on Railroads, p. 125, and cases cited in notes; and that such dividends are not payable absolutely and unconditionally as interest is, but only out of profits made by the company. The preference is limited to profits whenever earned. Jones on Railroad Securities, § 620, and cases cited in notes; Field on Corporation, § 121, and cases cited; Corry v. Railroad Co., 29 Bevan, 263; McGregor v. Ins. Co., 33 N. J. Eq. 181; St. John v. Erie R. R. Co., 10 Blatchf. 271, Fed. Cas. No. 12,226; s. c., 22 Wall. 136, 22 L. Ed. 743; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Taft v. Railroad Co., 8 R. I. 310, 5 Am. Rep. 575.

Under the provision of this charter it is not a debt that is guaranteed, but the right to a dividend from the earnings and income of the corporation. The right to a dividend is not a debt. There is no debt until the dividend is declared. The obligation and right to declare it does not arise until there is a fund from which it can properly be made. See cases supra; also In re London India Rubber Co., Law Rep., 5 Eq. Cases, 525.

In this case it could only be made from "earnings and income." The only earnings and income was the rental which was insufficient to pay the operating expenses and the floating debt. Upon the plaintiff's theory there was an unqualified obligation to declare and pay dividends to preferred stockholders from the earnings and income, notwithstanding there were debts of the company greater than the earnings and income. The creditor must come after the stockholder. Under this claim the rule universally recognized in the books that the property of a corporation in a trust fund pledged for the payment of the debts of the corporation, and the distinction everywhere upheld between a stockholder and creditors, would have to be disregarded. In our view the terms of the charter neither force nor import such construction.

II. But the learned counsel for the plaintiff deny that the preferred stock was capital stock, and insist that the only capital stock of the defendant company is the common stock, or the stock that was issued to the second mortgage bondholders, and that the intent and meaning of the charter in reference to the issue of preferred stock, was to provide means of exchanging the first mortgage bonds into preferred stock, but not to affect the security, and that such was the understanding of all parties at the time, and that wherever preferred stockholders have been held to be stockholders in distinction from creditors, it has been upon the ground that by the terms of the act or contract their stock formed a part of the capital stock, and that they by taking the same become in reality and in substance, as well as in name, stockholders, holders of shares of capital stock.

It is true the charter was granted to the second bondholders, and provides that the capital stock, meaning undoubtedly the stock to be

obtained by the second mortgage bonds, should be 3,000,000 dollars, and in the provision, section 8, for issuing the preferred or guaranteed stock, it is not called capital stock. But the counsel nowhere intimate in their able brief wherein the preferred stock lacked any element or quality of the common stock. It seems to have had every privilege and recognition of the common stock in the meetings and administration of the company. The referee puts it in this way: "Besides the preferred stock the company had issued about $2,500,000 of common stock, the holders of which were entitled to and did vote in the stockholders' meetings, having equal power in shaping and controlling the action of the company, with the holders of preferred stock to the same amount." The preferred stockholders had not only every privilege but were exempt from none of the liabilities of the common stockholders. If the eighth section of the charter had said preferred capital stock instead of preferred stock, what different quality would that have given the stock? The charter specifies the amount of the capital stock of the company, which was sufficient to cover the second mortgage bonds, but much less than the value of the road, the charter being granted to those bondholders, and it then provides for the issue of preferred stock, and limits that to the amount of prior claims or incumbrances.

The terms of this charter are plain to the intent of providing for two kinds of stock, viz.: common stock and preferred or guaranteed stock. It makes no distinction between them except to the effect that the preferred stock should receive dividends from the earnings and income of the corporation, at a rate and time named, with interest thereafter if not paid, "before any other dividend shall be made therefrom." What is there in the charter to indicate that the legislature intended to simply create a creditor class in creating preferred stockholders, and meant interest by the word "dividend"? As stated by Jones on Railroad Secu. § 619, "whatever rights attached to it [preferred stock] when issued continue to adhere to it." The peculiar right specified in the charter to be attached to it, is the right to a dividend before any should be made upon the common stock, and that it may be converted into common stock. In St. John v. Erie R. R. Co., supra, Judge Blatchford based his result upon a "fair and reasonable construction of the contract." Judge Swayne, in the same case in the Supreme Court, says: "The question presented in the present case depends for its solution wholly upon the construction given to the fifth clause of the agreement." The defendant's charter is the instrument to be construed here, and to borrow the words of Judge Swayne, "The language employed is apt to express the relation of stockholders. None to express the relation of creditors is found in the instrument." Under it "the preferred stockholders are entitled to have the full amount of their dividends paid before any payment is made in respect of dividends upon the ordinary stock." Jones, § 620, and cases cited. In Taft v. Railroad Co., 8 R. I. 310, 5 Am. Rep. 575, it was

held that the word "guaranteed" in connection with preferred stock, did not change the legal effect of the rights of holders of such stock. Bradley, C. J., after referring to the English cases, says: "Without dwelling longer upon these and similar authorities, it is perfectly apparent that the guaranty of dividends by a railway company is considered by the courts and by the business community also, to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend; that, in short, it is a dividend and not a debt."

No claim is made in this case that the preferred shareholder does not have all the rights as a shareholder that is enjoyed by the holder of the common stock. The claim is that he is also a creditor with all the rights pertaining to that relation. Against this claim are the terms of the charter, the presumptions of law and the usual course of business. The evidence of his relation to the company is a certificate of stock which under the charter should, and probably does, guarantee a dividend to be paid to him before any dividend shall be paid on the common stock. Mr. Pierce, page 120, defines dividends to be corporate funds derived from the earnings of the corporation, and appropriated by a corporate act to be divided among the stockholders. A preferred dividend is the fund paid to one class of shareholders in priority to that to be paid to another class. See authorities cited by Pierce.

The case most relied upon by the plaintiff's counsel, where it was held that a holder of stock was a creditor, is that of Burt v. Rattle. reported in The Reporter, March 6, 1878, p. 310, (31 Ohio St. 116.) The preferred stock in that case was issued under a statute that provided that the "holders of such preferred stock shall not have the right to vote on any question, at any meeting of the stockholders of such corporation, or for the election of officers, and shall not be liable for the debts of such corporation." And the corporation pursuant to a vote of the corporation secured the preferred stock then in suit by a bond and mortgage of the corporate property. Welch, C. J., in delivering the opinion of court says: "A majority of us think that the transaction between the corporation and the so-called preferred stockholders, was in fact and in law a loaning of money upon mortgage security and not the creation of additional members of the corporation. A man who advances his money to a corporation, and takes a bond and mortgage for its repayment, and also by express agreement between the parties takes no interest or risks in the concerns of the company, is a creditor of the company, and to call him a stockholder is a simple misnomer."

The distinction between that case and the one at bar is apparent. It is insisted that the provisions of the defendant's charter to the effect that the preferred stock should be issued only for the "purpose of satisfying, paying or purchasing prior claims, or incumbrances upon or interests in said road and property," and should be limited to the amount of such claims, and providing the rate of dividend, and for its payment semi-annually, and, "until declared," interest thereon to be

added from the end of the half year when the same should be declared, and that no mortgage should take precedence of the preferred stock in the application of income, all show a purpose to create a preferred stock with all the security of a first mortgage, taken in connection with the fact that the prior claims consisted largely of the first mortgage then in process of foreclosure.

Courts have not favored the creation of different classes of shareholders with superior rights in one over others. Doubt is expressed in the books whether there is power in a corporation to distinguish between its stockholders by making them unequal in interest and right, except as it is expressly granted. Although some courts and law writers have said that the issue of preferred stock is but a method of borrowing money, and that preferred stock is only a form of mortgage, we think the law as now settled is better expressed by Pierce, who says, page 124: "The issue of preferred stock is a mode by which a corporation obtains funds for its enterprise, without borrowing money or contracting a debt." The other view has been expressed generally in cases where the claim was that no dividend could properly be paid on preferred stock before and without paying on the other stock, as in R. & B. R. R. Co. v. Thrall, 35 Vt. 536; or where the preferred stockholders had no right in the management of the company, and were not liable for debts, and were nominal stockholders only, as in Burt v. Rattle, supra.

It was necessary for the defendant, consisting of the second mortgage bondholders, to raise money to pay up the first mortgage, in order to save the property from going on that mortgage. Two ways were open to them, one to borrow money, the other to sell stock. They decided to try the latter method. The pressure was severe upon them, and the amount to be raised was large. The stock in order to be sold must necessarily be carefully guarded. The issue of the preferred stock in this case was made as it usually is, that is, when the corporation has reached a crisis in its affairs, and the corporators are unwilling or unable to put more or sufficient money into the business, but are nevertheless disposed to give to those who will do so a preference in profits. Careful guards are, therefore, usually thrown around preferred stock in the charter or contract, as was done in this case; but this did not change the character of the transaction. It was still an obtaining of funds by sale of stock, and not a borrowing of money on a mortgage.

These provisions of the charter seem to us to point to a careful security of the benefit of the preference as between the two kinds of stock, but not a preference over the creditors of the corporation; not a preference with a perpetual promise to pay more than a legal rate of interest on the sum invested, out of the earnings, without regard to what the corporation owes as a "floating debt," not a preference that would give to the holders of the preferred stock the character of corporators with the right to be the corporate managers, and also make

them the preferred creditors of the corporation; not a preference under which the debts of the corporation might, and, as the company was situated, must go on increasing from year to year indefinitely unprovided for, while the stockholders and managers were receiving the whole income in dividends. We think the language of the charter well expresses what the report shows was the only object which the parties in interest needed or wanted to secure, so far as they then understood the situation, viz.: a preference in dividend between the two kinds of stock and nothing more. Under their preference the common stock can receive nothing until all the dividends on the preferred stock are paid according to the terms of the charter. Pierce on Railroads, page 125, and cases cited in notes.

It follows from this construction of the charter that the earnings of the defendant corporation should have been appropriated to the payment of its floating debt, in preference to the payment of dividends on preferred stock. * * *[24]

The pro forma judgment of the County Court is reversed, and judgment for the plaintiff to recover the amount of his scrip dividend certificates with interest as found by the referee, with interest thereon, and both the Central Vermont Railroad Company and the Cheshire Railroad Company are adjudged chargeable as trustees.[25]

STERNBERGH v. BROCK.

(Supreme Court of Pennsylvania, 1909. 225 Pa. 279, 74 Atl. 166, 24 L. R. A. [N. S.] 1078, 133 Am. St. Rep. 877.)

Appeal, No. 11, January Term, 1909, by plaintiffs, from decree of Common Pleas No. 4, Philadelphia County, March Term, 1907, No. 1,624, dismissing bill in equity in case of J. H. Sternbergh et al. v. Arthur Brock et al., directors, and H. M. Richards, treasurer, of the American Iron & Steel Manufacturing Company, and the said American Iron & Steel Manufacturing Company.

POTTER, J.[26] On July 7, 1899, four manufacturing concerns, the Pennsylvania Bolt & Nut Company, J. H. Sternbergh & Son, the Lebanon Iron Company, and the East Lebanon Iron Company, entered into an agreement, by which they were to transfer to a proposed corporation the whole of their respective "plants, franchises, good will, business, patents, trade-marks, and property of every sort and kind." The agreement further provided that they should receive for the prop-

[24] Part of the opinion is omitted. It was held that the company was estopped to deny the validity of the certificate.

[25] See Taft v. Hartford, etc., Ry. Co., 8 R. I. 310, 5 Am. Rep. 575 (1866); New York, L. E. & W. Ry. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363 (1886).

[26] Part of the opinion, dealing with the question of practical construction of the contract, has been omitted.

erty so transferred full-paid and nonassessable preferred stock of the proposed corporation of the par value of $50 per share, of which $3,000,000 worth were to be issued and divided among them in designated proportions. The agreement also provided: "The said preferred stock shall have an accumulative preference of five per cent. (5%) dividend annually, payable quarterly on the first days of January, April, July and October, and the first preference as to the distribution of the assets of the company; and further none of the property or franchises of the proposed company can be mortgaged without the consent of at least a majority of the preferred stock." Common stock to the extent of $17,000,000 was also to be issued, divided into 340,000 shares, with a par value of $50 each, upon which $5 per share was to be paid in cash.

In pursuance of this agreement, the American Iron & Steel Company was incorporated on August 21, 1899, under the laws of Pennsylvania, for the manufacture of iron and steel products. The capital named in the articles of incorporation was 20 shares, with a par value of $1,000, but this was increased by action of the stockholders on August 23, 1899, to $20,000,000, divided in $3,000,000 of preferred and $17,000,000 of common stock, all of a par value of $50 a share.

By resolution adopted at the stockholders' meeting of August 23, 1899, it was provided "that the preferred stock whose issue was thereby authorized to the amount of $3,000,000 should be entitled (a) 'to receive a cumulative yearly dividend of five per cent., payable quarterly on the first days of January, April, July, and October, in each year, before any dividends shall be set apart or paid on the common stock; (b) to be paid in full both principal and accrued dividends in the event of liquidation or dissolution of the company before any amount shall be paid to the holders of the common or general stock; (c) to require the consent in writing of a majority of the holders thereof to the creation of any mortgage.' "

The stock was issued as provided for in the agreement and the resolution of the stockholders. On February 27, 1905, the common stock was reduced, after an assessment of $2.50 a share had been levied, to 51,000 shares, of the par value of $2,550,000, making the total capital stock $5,550,000.

From the organization of the company until the year 1907 the holders of preferred stock were paid the stipulated 5 per cent. annual dividend, and no more, while all profits above the amount so paid were distributed by dividends to the common stockholders. In March, 1907, a quarterly dividend of 2 per cent. was declared by the directors upon all the stock, both preferred and common, which was at the rate of 8 per cent. per annum.

J. H. Sternbergh, who was a holder of the common stock, filed this bill in equity against the directors and treasurer of the company and the corporation itself, alleging that the preferred stockholders were not entitled to receive more than 5 per cent. per annum on the par

value of their stock, and praying the court to enjoin the payment to them of the dividend declared in excess of one-quarter of that amount.

Answers and replication were filed, and the case was tried before Audenried, J., who found that the plaintiffs were not entitled to an injunction and recommended that the bill be dismissed. Exceptions to the findings of the trial judge were dismissed by the court in banc, and a decree made dismissing the bill, with costs. Plaintiffs have appealed, and have assigned for error the dismissal of their exceptions and the decree dismissing the bill.

Three questions are raised by the arguments of counsel on this appeal:

(1) Whether preferred stock issued by a company incorporated under the corporation act of 1874 is limited as to dividends to the amount of its preference; or whether, after payment of an equal amount as dividend on the common stock, it is entitled to participate in the distribution of the remaining profits, if any.

(2) Whether, under the agreement and resolution in the present case, the preferred stockholders can receive dividends of more than 5 per cent. per annum on the par value of their stock.

(3) Whether the alleged fact that for a long series of years the preferred stockholders were paid without objection on their part only 5 per cent. per annum and the entire balance of profits was paid to the common stockholders is to be considered in determining the present rights of the parties.

The authority to issue the preferred stock in the present case is derived from Act April 29, 1874 (P. L. 81) § 16, which provides: "Every corporation created under the provisions of this act, or accepting its provisions, may, with the consent of a majority in interest of its stockholders, obtained at a meeting to be called for that purpose, of which public notice shall be given during thirty days in a newspaper of the proper county, issue preferred stock of the corporation, the holders of which preferred stock shall be entitled to receive such dividends thereon as the board of directors of the corporation may prescribe, payable only out of the net earnings of the corporation."

The learned judge of the trial court was of opinion that the present case is ruled by Fidelity Trust Co. v. Lehigh Valley R. R. Co., 215 Pa. 610, 617, 64 Atl. 829, 832, 7 Ann. Cas. 613. It was there said: "When each class of stock had been paid 10 per cent., they were equal, and equally entitled to partake of whatever remained in the fund applicable for dividend purposes. The preferred stockholders were not creditors."

In West Chester, etc., R. R. Co. v. Jackson, 77 Pa. 321, a loose expression was used when it was said that "preferred stock is only a form of mortgage." Whatever the extent of the preference in that case may have been, speaking generally, stock, whether it be common or preferred, does not represent indebtedness. Its possession means ownership of the company.

The authority under which the preferred stock was issued in Fidelity Trust Co. v. Lehigh Valley R. R. Co., 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613, was contained in Act March 4, 1850 (P. L. 130), which provided: "And the said additional stock so issued shall be entitled to a preference over all the other stock of the said company in every future dividend of profits which may be declared by the said company, until the holders of such additional stock shall have been paid from the funds applicable to the payment of such dividend, ten per cent. per annum on the amount of capital stock of the company represented by said shares of additional stock so held by them respectively; and the holders of the other stock of the company shall not be entitled to participate in any future dividend of the profits of the company until the holders of said additional stock shall have been paid from the funds applicable to such dividend, ten per cent. per annum on the amount of the capital stock of the company represented by said additional shares so held by them respectively."

In reply to the same contention which is made here, the court below very appropriately, and as we think convincingly, said: "In attempting to distinguish between the contract in the present case and that considered by the Supreme Court in Fidelity Trust Co. v. Lehigh Valley R. R. Co., much reliance is placed by counsel for the plaintiffs on three peculiarities of expression in the act of 1850. These are, first, the use of words alluding to the preferred stock thereby authorized as representing a definite part of the company's aggregate capital stock; second, the limitation of the preference by the words, 'until the holders of such additional stock shall have been paid 10 per cent. per annum'; and, third, the employment of the word 'participate' as applied to the right of the holders of the common stock to receive dividends from the company's profits. These points of difference are but trifling, and constitute no sound distinction between the essential terms of the two contracts under comparison. With respect to the use of the word 'participate,' it is enough to say that it probably refers here to the sharing of the profits of the corporation among the holders of the common shares themselves rather than to the distribution between the two classes of stockholders. The words which serve to limit the preference of the additional shares, viz., 'until the holders of such additional stock shall have been paid 10 per cent. per annum,' imply nothing different from what is implied by the words 'before any dividend shall be paid or set apart on the common stock' contained in clause 'a' of the resolutions of the American Iron & Steel Manufacturing Company, above quoted. The words 'amount of capital stock represented by said additional stock,' in the act of 1850 are devoid of the significance ascribed to them. They are merely a clumsy paraphrase of the expression 'par value' which the draftsman of the act probably regarded as too colloquial a term for use by the Legislature."

Where there is no stipulation in the contract to the contrary, the weight of authority clearly favors the right of preferred stockholders

to share with the common stockholders in all profits distributed, after the latter have received an amount equal to the stipulated dividend on the preferred stock. "In the absence of special provisions, the holders of preferred stock in a corporation are in precisely the same position, both with respect to the corporation itself and with respect to creditors of the corporation, as the holders of common stock, except only that they are entitled to receive dividends on their shares, to the extent guaranteed or agreed upon before any dividends can be paid to the holders of common stock." 2 Clark & Marshall on Priv. Corp. (1901) § 417c. "A share of stock is a share of stock, whether preferred or common." 1 Cook on Corps. § 269, note. See, also, 1 Elliott on Railroads (2d Ed.) § 84; 2 Beach on Priv. Corp. § 501.

We do not find anything in the agreement or resolution in the present case which limited the preferred stockholders to a dividend of 5 per cent. per annum upon their stock. * * *

The assignments of error are overruled, and the decree is affirmed.[37]

IV. Distributive Share

CRAYCRAFT et al. v. NATIONAL BUILDING & LOAN ASS'N.

(Court of Appeals of Kentucky, 1904. 117 Ky. 229, 77 S. W. 923.)

Appeal from Circuit Court, Jefferson County, Chancery Division.

O'Rear, J. Appellee is a building and loan association organized and operating under the laws of Kentucky, and subject to the provisions of the present Constitution and statutes. Appellee found it was unable to prosecute its business with success, and, in the course of its business, by investment in real estate and the purchase of real estate for debts, it acquired real property of the value of about $140,000 at its book value; that is, at the price which the property cost appellee. It had a large number of stockholders, holding a large amount of its capital stock, which at its book value (that is, the aggregate of dues paid on stock, and of the dividends which had been declared and credited to the stock), amounted to a sum much in excess of the value of the real estate. Its assets, consisting of notes secured by mortgages and by pledges of stock, together with the book value of the real estate, practically balanced the liabilities of the company to its stockholders.

The pleadings claim, and proof in this case indicates, that this real estate could not be sold in the ordinary and usual way of selling for as much as $140,000, by practically one-third of that amount; that is, the real estate could not have been sold in the usual way for more than $93,000 or $94,000. To sell this property, therefore, in this way, would have made the company unable to pay its stock-

[37] See Scott v. Baltimore & Ohio R. Co., 93 Md. 475, 49 Atl. 327 (1901).

holders in full, by the sum of $46,000, if the result should be as anticipated. Taking into account depreciations in value and losses which must necessarily result in collecting its personal assets, the company, in the usual way of winding up, is probably insolvent. With this condition confronting them, the directors, through a committee, while in process of liquidation, conceived a plan of disposing of this real estate to its stockholders by adding to the cost value of the real estate arbitrary amounts, not exceeding 8 per cent. of any one piece of property, and accepting in payment therefor stock of the stockholders at its book value, with the stipulation that in the event the assets, upon final distribution, were sufficient to pay to the stcokholders who did not purchase real estate more than was received by the stockholders who exchanged stock for real estate, such surplus should be distributed to all of the stockholders alike. It will be observed that there was no final surrender of the stock, or of the rights of stockholders, upon the exchange of stock for real estate.

In order to ratify this plan, a meeting of the stockholders was called, and was attended by the holders of a bare majority of stock—a bare quorum—and the plan was ratified by a bare majority; and, of this bare majority of the stock, 26 shares attending the meeting voted against approving the plan. Under the plan adopted, offers for the property by stockholders, to be paid in stock, were authorized to be made up to February, 1903, at which time the right of stockholders to make such exchange expired, under the terms of the plan. After such approval as was made by the stockholders of the proposed plan for disposing of the real estate, printed propositions containing the substance of the above plan, and a list of real estate of the appellee, with prices, were mailed to each of the stockholders. Prior to the 1st of February, 1903, the company received propositions under the plan for about $30,000 worth of its real estate, and no more. About the time this plan was adopted by the directors, a resolution was adopted by the corporation, in substance, that it would proceed to dispose of its assets, pay its liabilities, and wind up the business. This did not legally put the company in liquidation. See Economy, etc., Association v. Paris Ice Company, 113 Ky. 246, 68 S. W. 21.

In the meantime, however, a consent such as is required by section 561, Ky. St. 1899, was signed by the necessary number of stockholders, and lodged with the directors in the latter part of January, 1903; and between that time and the 1st of February, at which time the plan above mentioned expired, the appellant Craycraft made a proposition to exchange stock of appellee of the book value of $648 for the lot described in the petition, upon condition that the corporation would convey the property to him by a good, merchantable, indefeasible, fee-simple title. This proposition was accepted

by the appellee, and a deed was drawn and tendered to appellant, which he declined to accept. This suit was brought for the specific performance of that contract.

The question involved here is whether the plan for disposing of its real estate is legal, whether appellant, at this stage of the winding up of appellee, would obtain by the deed tendered a good merchantable, indefeasible, fee-simple title to the property described in the petition. These propositions involve the question whether the transaction above set forth is a sale of the lot described in the petition, such as they can lawfully make, or whether it is a mere distribution of assets to the stockholders receiving the property, and whether the property itself remaining in the hands of the stockholders, at the suit of dissenting or nonconsenting stockholders, would be brought in for the purpose of procuring an equal distribution of the assets of the corporation among all of its stockholders alike. It will be observed that only about $30,000 worth of this $140,000 worth of real estate was bargained for on the plan above described before the expiration of the plan, which leaves $110,000 worth, as to which there is no assurance that it can be sold in the same way or upon the terms under renewal or extension of the plan; and, if not sold, its sale in the ordinary way of winding up a corporation may make the corporation so insolvent as to result in other stockholders receiving a much less pro rata from the assets of the corporation than those who get real estate for their stock.

That appellant was entitled to receive not only a deed, with covenant of general warranty, conveying the fee-simple title, but was to receive an indefeasible title, is admitted. If the scheme evolved by the majority stockholders, and above set forth, did not enable the corporation to pass such title to the stockholders whose bids might be accepted, then the specific execution of the contract between appellant and the association should not be adjudged. It should be borne in mind that the corporation is not indebted. Its sole liability is to its stockholders.

The argument is made that, in the course of a voluntary liquidation upon a statutory dissolution of a corporation, the will of the majority in interest as to the time and method of procedure, so long as it does not produce a substantial inequality in the result, must be allowed to control. The argument is utilitarian, and is opposed by the characterizing principles of the common law, which regard the rights of the individual in private property, in preference to the will or welfare of any greater contending number. The question of the rights of the stockholders as among themselves is one of implied contract. It is that, upon a dissolution of the joint enterprise for which they formed the corporation, its assets, after paying its indebtedness, will be distributed pro rata among the stockholders according to interest. It may be that, if these assets were of a qual-

ity capable of an exact partition in the proportion represented by each shareholder's interest, they might be distributed in specie. But that can rarely happen. The only dividend which can ordinarily receive the devisor of share interests is money. The basis or contribution, of reckoning liability, and of apportioning the final results is money. To liquidate, in law, is to make certain or exact, in units of money, and, in the sense in which the word is used in winding up a corporation, to discharge, in lawful money, the liabilities so ascertained. Each stockholder is entitled, as a matter of right, and as an incident of his contract, to participate in the distribution on that basis. Although the majority in interest and numbers may conceive their interest to be, and although it may be a fact that their interest is, to hold the assets of the corporation for future enhancement of value or for other uses, the dissident members are not bound to yield their right to a legal liquidation to the welfare of the others. To make them do so would be compelling them, against their wills, to enter into a different contract from the one originally made. The doctrine being discussed is thus stated by Cook on Stock and Stockholders (1st Ed.) 636: "When the regular business of a corporation has been brought to a close, the shareholders have a right to an immediate distribution of the corporate assets. They cannot therefore, be compelled to accept other property or rights in lieu of cash." The authorities cited by the author support the text.

Using the instant case as an illustration, it may be, and probably is, that among the nonconsenting or dissenting stockholders there are some who hold but a few shares—possibly some who hold only a single share—of stock. It is not likely that such of them would be able to find a piece of real estate on the list of the same value as his share or shares. He may not be able or willing to invest money in addition in the real estate offered, and especially at the price offered. He would then be compelled to yield absolutely to other stockholders his claim as stockholder upon $140,000 of real estate of the corporation, and to take the chances of realizing an equal proportion from the remaining assets of the company. It might be advisable for him to adopt that plan. But the question is, does the law compel him to relinquish a present valuable interest for a chance? It is not true, strictly, that every stockholder has an equal chance in the proposed plan, even if an even chance in any thing except money would satisfy his right. For there are about $200,000 worth of shares, at book value, with only about $140,000 of real estate at book value. Some of these shares must necessarily fail to participate in this partition of the real estate, and therefore be compelled to take whatever chance there may be in realizing an equivalent sum, proportionately, from the other assets of the company. If they should fail, to that extent there would be an unequal distribution of the assets of the corporation among the shareholders of the same

rank, if the scheme here involved should be adjudged by the court. Such a distribution would never be decreed or sanctioned by a court of chancery. Nor are we aware of either principle or precedent that would allow a minority stockholder to be bound against his will by a resolution of the majority that would or could produce such result.

It is suggested that this scheme is particularly desirable and beneficial to all stockholders, because thereby extraordinary costs of winding up by proceedings in the courts are averted. Under section 561, Ky. St. 1899, the board of directors of a corporation in voluntary liquidation are given ample power to do all that is necessary to pass title to its real estate by sales and conveyances, by public or private sales. Indeed, it is made their duty to expeditiously take these steps to reduce the assets into condition for distribution. The suggestion of the costs and court expenses is probably more a bugaboo than a danger.

We do not mean to say that the plan submitted to the stockholders was not a judicious one. If all the stockholders had agreed to it, it is altogether probable it would have worked out satisfactorily. But even if that were clearer than is made to appear, we know of no legal way to compel them to enter into the agreement, for, at last, any deviation from the legal enforcement of the stockholders' rights is a matter of agreement among the parties. All the assets of the corporation in liquidation are a trust fund, which must be ratably distributed among all the stockholders of the same rank. If any of them are permitted to withdraw a greater proportion than others (i. e., any part of it that they were not entitled to), the former would be compelled to restore at least the surplus, that the others might be made equal. William Goodrich v. City L. & B. Ass'n, 54 Ga. 98; Allen v. Russell, 78 Ky. 105; Endlich on Building Associations, 526.

From this it follows that appellant would not get an indefeasible title to the lot contracted by him, for, upon a failure of any of the nonconcurring stockholders to receive an equal sum or value on final distribution, he could be compelled, at the suit of such stockholders, to surrender to them at least the surplus in value in the lot over his pro rata of all the corporation assets.

The judgment of the circuit court decreeing the specific performance of the contract of exchange of the lot for the seven shares of stock is reversed, and cause remanded, with directions to dismiss the petition.

HELLMAN v. PENNSYLVANIA ELECTRIC VEHICLE CO.

(Court of Chancery of New Jersey, 1907. 73 N. J. Eq. 269, 67 Atl. 834.)

LEAMING, V. C. The affairs of defendant corporation are being settled by its board of directors, as statutory trustees, under proceedings of voluntary dissolution. The bill in this case seeks the appointment of a receiver to supersede the trustees in winding up the corporate affairs. The assets of the company being ample to pay its debts, no rights of creditors are involved. The present controversy arises through a claim upon the part of the common stockholders that the preferred stockholders are preferred only as to the payment of dividends and are not to be preferred in the distribution of the assets. This claim is based upon the fact that neither the amended certificate of incorporation which provides for the issuance of preferred stock nor the certificates of preferred stock as issued state that the preferred stock is to have a preference in the distribution of assets at dissolution.

The provision in the amended certificate of incorporation is as follows: "Holders of the preferred stock of this company to receive, and the company to pay, a fixed yearly dividend of six per cent. (6%) before any dividend shall be set apart on the common stock."

I am unable to reach the conclusion contended for by complainant. It appears to be well settled that preferred stock is not entitled to a preference over common stock in the distribution of the surplus assets of a corporation at its dissolution in the absence of any provision to the contrary in the statute or in the contract under which the preferred stock was issued, and that the language above quoted from the certificate of incorporation, standing alone, would be held to create a preference in the payment of dividends only. 1 Morawetz on Pri. Corp. § 461; 1 Cook on Corp. § 278; 26 Am. & Eng. Enc. of Law (2d Ed.) p. 834. But I think that the language above quoted from the certificate of incorporation must be regarded as having been used and understood by the contracting parties in the light of a long-existing legislative declaration of the rights of holders of preferred stock, and when so regarded I am convinced that the language used must be held to have been intended to confer upon preferred stockholders a preference over common stockholders in the distribution of surplus assets at dissolution.

The legislative declaration of the rights of preferred stockholders to which I allude is first found in section 80 of the revised corporation act of 1875 (Gen. St. p. 923). That section provided that in the final distribution of the assets of a corporation the surplus funds, "after the payment of the creditors and the costs and expenses as aforesaid, and the preferred stockholders, may be divided and paid to the general stockholders proportionately, according to their respective shares." In the year 1880 Vice Chancellor Van Fleet, in McGregor

v. Home Insurance Co., 33 N. J. Eq. 181, in determining the rights of preferred stockholders at the dissolution of a corporation, where the express contract touching the issuance of the stock provided for a preference as to dividends and was silent as to preference in the distribution of assets at dissolution, recognized the general rule that such a stipulation, standing alone, would be held to relate only to the rights of the stockholders in the corporation as a going concern; but construed the section of the statute above referred to as a legislative declaration of the rights of preferred stockholders where no contrary provision could be found in the law or in the contract under which the preferred stock was issued. Section 25 of the act of 1875 (Revision 1877, p. 181) provided that the corporation should have power to issue general and preferred stock; but contained no provision contemplating a statement in the certificate of incorporation touching the rights of holders of the several kinds of stock. The revised corporation act of 1896 under which the corporation now in question was incorporated (P. L. 1896, p. 277, c. 185), re-enacts section 80 of the act of 1875 (Revision 1877, p. 191), in substantially the same language, retaining the provision touching distribution of assets to preferred stockholders at dissolution in preference to general stockholders (P. L. 1896, p. 304, § 86). Section 18, p. 283, of the act of 1896, provides that "every corporation shall have power to create two or more kinds of stock of such classes, with such designations, preferences and voting powers, or restrictions or qualifications thereof, as shall be stated and expressed in the certificate of incorporation."

Section 8 requires that the certificate of incorporation shall set forth, among other things, "a description of the different classes of stock, if there be more than one class created by the certificate, with the terms on which preferred shares are created."

It will thus be seen that the act of 1896, while reasserting the old declaration that the holders of preferred stock shall participate in the distribution of surplus assets at dissolution in preference to the holders of common stock, at the same time adopts provisions to enable a corporation to create preferred stock the holders of which shall not be so privileged. In view of the fact that the effect of the language used in section 80 of the act of 1875 had been regarded in this state for so many years, under unquestioned judicial construction, as a legislative declaration that the stipulation for perferment as to dividends would, in the absence of contrary stipulations or law, be treated as sufficient to effect a preferment as to assets at dissolution, I think that the re-enactment of the same language in section 86, p. 304, of the act of 1896, in connection with other provisions enabling a corporation to specifically define in its certificate of incorporation, the extent of preferments of various classes of stock must be held to be a continuation of the same legislative declaration in all cases where a contrary rule of preference is not specifically and clearly stipulated. In the McGregor Case the express contract of preferment was as to dividends

only. In the present case the preferment defined by the certificate of incorporation is in the substance the same. I think that the contracting parties in the present case, in view of the provisions of section 86 of the act of 1896 and the prior legislation and its judicial construction, were entitled to regard the language of the certificate of incorporation touching preferment as sufficient to effect a preferment in distribution of surplus capital at the dissolution of the corporation.

This view disposes of the other questions raised. It was urged that there has been an unlawful reduction of the par value of the preferred stock, and that with this unlawful action set aside the holders of the preferred stock will be subject to further calls on their subscriptions. These considerations were urged as reasons for the removal of the present statutory trustees whose personal interests are opposed to these contentions. It is manifest, however, that if the preferred stockholders are entitled to preference in the distribution of assets it is entirely purposeless to adjudge their stock to be of the par value at which it was originally established and to then require payment by them of the amount of the increase, for the money so paid would necessarily be repaid to the same parties.

I am unable to find any sufficient reason for the appointment of a receiver.[28]

SECTION 2.—POWERS OF MAJORITY

DUDLEY v. KENTUCKY HIGH SCHOOL.

(Court of Appeals of Kentucky, 1873. 9 Bush, 576.)

LINDSAY, J.[29] The order from which this appeal is prosecuted must be regarded as final. The special demurrer to the jurisdiction of the court was sustained, and a judgment rendered against appellant for the costs of the entire proceeding. This is equivalent to dismissing the petition for the want of jurisdiction in the court, and effectually precludes appellant from taking further steps in this litigation to obtain the relief desired. * * *

The object of the corporation was to establish and maintain a high-school, and not to make money, and it has no legal right to engage in speculations or investments in real estate for the last-named purpose; but it has the expressly delegated power "to receive and hold for the benefit of said high-school any lands, tenements, etc., * * * by gift, devise, donation, contract, or purchase." It is not complained that the house and lands purchased or about to be purchased from Gaines

[28] Compare People v. New York Building-Loan Banking Co., 50 Misc. Rep. 23, 100 N. Y. Supp. 459 (1906).

[29] Part of the opinion is omitted.

are not to be held for the benefit of the school, but that the corporation is unable to pay the contemplated price, and that the inevitable result of the purchase, if consummated, will be the bankruptcy of the corporation and the failure of the project to establish the school. * * *

It is true that a majority of stockholders, no matter how great, have not the right to divert the funds of a joint-stock incorporated company to any other than the purposes for which it was organized; and if such funds are about to be so diverted, a stockholder may file a bill in equity against the company to restrain it by injunction from such diversion or misapplication. Bagshaw v. Eastern Counties Railway Co., 7 Hare, 114; 1 Beavan, 1; March v. Eastern Railway Co., 40 N. H. 548, 77 Am. Dec. 732. But relief will not be granted unless the corporation is about to do some act outside of the scope of its authority, or in disobedience to the provisions of its constitution, for so long as it exercises the powers granted by the charter the acts of the company must be treated by the courts as the acts of all the stockholders.

Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation; and in cases involving no breach of trust, but only error or mistake of judgment upon the part of the directors who represent the company, individual stockholders have no right to appeal to the courts to dictate the line of policy to be pursued by the corporation. Angell and Ames on Corporations, § 393. Nor does the irregular manner in which the board of directors voted upon the proposition to make the purchase from Gaines authorize the chancellor to interpose to prevent its consummation. In the case of Foss v. Harbottle, 2 Hare, 461, where the object of the bill in equity was to obtain relief against what was alleged to be a fraud committed by certain of the directors in an incorporated company, which fraud consisted in the sale to themselves, as representatives of the company, of lands in which they were individually interested, Vice-Chancellor Wigram held that although the act might be voidable by the company, yet, inasmuch as a majority of the proprietors might at a general meeting confirm it, he declined to interfere, saying, "While the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit." So in this case, while it may be that the corporation has the right to avoid the purchase from Gaines, because one of the directors, without whose vote the proposition would have been rejected, was allowed to vote by proxy, yet it may be that Dudley is the only stockholder who disapproves of the purchase, and it might result that, at the time the court was protecting him against the payment of his subscription because of the unauthorized action of the directors,

a majority of the stockholders in general meeting might ratify or have already ratified the purchase, and bound Dudley under his contract of subscription to submit to their will thus regularly and legally expressed.

It may be that the price agreed to be paid for the house and lands is greatly more than its value, but about this matter the opinion of the majority of the stockholders as expressed through the directory must control, and so far as the action of the court in this case is concerned it is immaterial whether the corporation acted wisely or unwisely in contracting a debt which possibly it will be unable to pay. The charter empowers it to make purchases of land, to contract debts, and to issue bonds to an amount not over two thirds of the stock subscribed; and if these powers are so exercised as to result in loss to the stockholders, it is a misfortune against which the courts can afford no protection. Judgment affirmed.

WINDMULLER v. STANDARD DISTILLING & DISTRIBUTING CO.

(Circuit Court of the United States, 1902. 114 Fed. 491.)

The complainants are the holders of certain shares of the first and second preferred stock of the Spirits Distributing Company, upon which the Standard Distilling & Distributing Company have guaranteed a dividend of 6 per cent. upon the first preferred and 2 per cent. upon the second preferred stock, during the existence of the Spirits Distributing Company. This guaranty was given in consideration of the transfer to the Standard Company of the common stock of the Distributing Company. This stock constituted a majority of the stock of that company. The Standard Company, after such transfer, took charge of the business of the Distributing Company by qualifying and electing as directors a majority of the board. The Distilling Company of America has become the holder of the greater part of the preferred stock of the Distributing Company and a majority of the stock of the Standard Company, and through the Standard Company and the holding of such preferred stock controls the Distributing Company. At a meeting of the board of directors of the Distributing Company it was resolved that, in the judgment of the directors, it was most advisable and for the benefit of the corporation that it should be dissolved. In accordance with the general incorporation act of New Jersey, a meeting of the stockholders was called to vote upon the propriety of adopting such a course. The complainants have obtained a rule to show cause why an injunction should not be granted, restraining the Standard and the Distilling

Companies from voting the shares held by each, respectively, in the Distributing Company.[80]

KIRKPATRICK, District Judge.[81] * * * The prayer of the complainants' bill is that the Standard Company may be enjoined from voting upon its $3,675,000, par value, common stock in favor of said proposition, because it has guarantied the dividends on the stock of the Distributing Company as aforesaid, and that the Distilling Company be enjoined from voting upon its $2,592,650, par value, of first and second preferred stock, which it has purchased and owns, because it also owns a majority of the stock of the Standard Company, which is the guarantor thereof. That is to say, however advisable and for the benefit of the corporation it may be that the same should be dissolved, yet it cannot be done because two-thirds of the stockholders whose votes are necessary to accomplish such result are disqualified from voting by reason of their interest in the cancellation of a guaranty which the complainants now conceive to be adverse to their interests.

To carry the doctrine to its logical conclusion would be to hold that, if the guarantor's company and those who own a majority of the stock in the guarantor's company should also be the owners of all the stock in the guarantied company except one share, the owner of that one share could prevent the dissolution of the company forever, if its charter were perpetual, or compel its operation at a loss until all its assets were wasted or consumed. Section 51 of the general corporation act of New Jersey provides that any corporation organized under it "may hold the shares of any other corporation of that or any other state," and, while the owner thereof, "may exercise all rights, powers, and privileges of ownership, including the right to vote thereon." In respect to the voting power, the rights of a corporation are identical with the rights of an individual, and only those reasons would operate to prevent a corporation from voting on its stock which would effect the same object if the stock was held by an individual.

I have not been referred to any authority which holds that one stockholder is in any sense a trustee for other stockholders, or that he is debarred from voting on his stock according to what he may conceive to be his interest, or in a way which may result in a benefit to himself, and which other stockholders may not enjoy. Directors, by whomsoever elected, are the representatives of all the stockholders, and, as such, are charged with the duty of administering the affairs of the company for the equal benefit of their cestuis que trustent. But the doctrine is new that the stockholders are trustees one for another, or that an interest of one stockholder, which in the judgment of another stockholder may seem to be adverse to his own,

[80] The statement of facts is abridged.

[81] A part of the opinion is omitted.

can operate to prevent him from voting on his own stock as he sees fit.

In the case of Transportation Co. v. Beatty, 12 App. Cas. 589, one of the directors owned a majority of the stock of the corporation, and at a meeting of the shareholders, by reason of his majority, he caused to be passed a resolution ratifying a contract to sell to the company, upon advantageous terms, a vessel belonging to himself. In passing upon the propriety of his right to vote, the court said: "Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company; and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to or different from the general or particular interests of the company. A shareholder has a perfect right to exercise his voting power in such manner as to secure the election of directors whose views on policy agree with his own, and to support those views at any shareholders' meeting."

The court cannot be called upon to manage the internal affairs of corporations, or to determine whether this or that stockholder is disqualified from voting upon one or another question which may be presented to the stockholders for their consideration by reason of his own interest. If the directors, who are the trustees of all, conspire with a few or some of the stockholders to deprive the others of their property, the court will interfere to see that justice is done. The court will not permit the directors to divert the business of the corporation so that a sale and sacrifice of its assets will become obligatory, and the distribution of the proceeds unequal among its shareholders. This is the doctrine which is at the foundation of the opinion in the case of Farmers' Loan & Trust Co. v. New York & N. R. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689, and Ervin v. Navigation Co. (C. C.) 27 Fed. 625.

No case has been brought to the attention of the court where any stockholder has been deprived of his right to vote on his stock in such a way as may, in his opinion, best subserve his own interests. He may vote his stock as he pleases for the purpose of his own interest, but he may not sell, or cause to be sold, assets and keep the consideration. Menier v. Telegraph Works, 9 Ch. App. 350. In Gamble v. Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527, a stockholder's right to vote was questioned because of interest, and the court of appeals, reversing the decision of the lower court, said: "A shareholder has a legal right, at a meeting of shareholders, to vote upon a measure, even though he has a personal interest therein separate from other shareholders. At such a meeting each share-

holder represents himself and his own interests, and he in no sense acts as the representative of others. The law of self-interest has at such time very great and proper sway. There can be little doubt, too, that at such meetings those who do vote on their own stock vote upon it in the light solely of their own interest, or at least in what they conceive to be their own interest."

In the case at bar the court is not in possession of facts which would enable them to determine whether the interests of the corporation, as distinct from the interests of the individual shareholders, require that it should be dissolved. Under the general corporation act of the state of New Jersey, any corporation may be dissolved whenever in the judgment of the board of directors it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved; provided that, at a meeting of the stockholders called for the purpose of passing upon the propriety of such dissolution, two-thirds in interest of all the stockholders shall consent thereto. Laws 1896, c. 185. There is no provision in the law which authorizes the court to review the judgment of the directors as to the advisability of dissolution. And in 4 Thomp. Corp. § 433, it is said: "It is believed that no case can be found in which a court of equity has granted an injunction at the suit of a minority stockholder against the majority to prevent them from discontinuing the business of the corporation and winding up its affairs."

It is urged in behalf of the complainants that it would be inequitable to allow the Standard Company, after having received a valuable consideration for their guaranty, by their own act to dissolve the corporation, and thereby cancel its said obligation. But it must be remembered that, in the proposition made to the stockholders of the Distributing Company by Mr. Eicks, Mr. Eicks said that, if such stockholders would consent to a reduction of the rate of their dividends, he would procure the Standard Company to guaranty and pay, during the existence of the company, dividends at the rate of 6 per cent. per annum on the first preferred, and 2 per cent. per annum on the second preferred, stock of the Distributing Company. To that proposition the complainants assented, and they did so with the knowledge that at any time, under the laws of the state of New Jersey, two-thirds in interest of the shareholders of the Distributing Company could dissolve the company, and thereby put it out of existence. They are in no position to complain if, in accordance with the terms of the agreement, the Standard Company and the Distilling Company, who are the stockholders of the Distributing Company, propose to put an end to their liability thereunder.

Other reasons are urged in behalf of the defendant company why this injunction should not be granted, but, having come to the conclusion that the Standard Company and the Distilling Company of

America are not prohibited from exercising their right to vote at the stockholders' meeting upon the question of dissolution submitted by the board of directors, it is not necessary to enter into any discussion of them.

For the reasons already stated, therefore, the rule to show cause in this case must be discharged.[32]

CHICAGO HANSOM CAB CO. v. YERKES.

(Supreme Court of Illinois, 1892. 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315.)

Charles T. Yerkes, a stockholder of the Chicago Hansom Cab Company, filed his bill in chancery in the Cook circuit court against that company, Warren Springer, Rose Abernethy, and others, to have a sale and conveyance of real estate and personal property of the company to said Rose Abernethy declared void, and set aside, and for an injunction and the appointment of a receiver. A temporary injunction was issued and a receiver appointed, as prayed. Answers were filed to the bill, putting in issue its material allegations. By consent of parties, before the hearing, the receiver was directed by the court to inventory the personal property. An appraiser was appointed to assess the value of the personal property, and it was further decreed that the property should thereafter be turned over to Rose Abernethy upon her giving bond, all of which was done. Upon final hearing, Yerkes filed, by consent of court, a supplemental bill to wind up the corporation and sell the real estate, apply the proceeds to the payment of the corporate debts, and distribute any surplus there might be, after such payment, among the stockholders. The court decreed as prayed in the original and supplemental bills, and Springer and Abernethy appeal from that decree.

The facts material to the questions discussed in the opinion are, in brief, these: The Chicago Hansom Cab Company was organized for the purpose of carrying on the business of the transportation of persons and property by hansom cabs and other vehicles drawn by animals. It carried on this business for some time. The business proved unprofitable, however, and in 1889, all of the stockholders being in favor of closing up the affairs of the corporation, a meeting of them was called to consider the feasibility of such a step. At this meeting Yerkes was duly instructed to consult with an attorney as to the proper and legal method of winding up the affairs of the corporation, and to report thereon at an adjourned meeting. Before this meeting

[32] See Beatty v. Northwestern Transportation Co., L. R. 12 App. Cases, 589 (1887).

Compare McLeary v. Erie Telegraph & Telephone Co., 38 Misc. Rep. 3, 76 N. Y. Supp. 712 (1902).

was had, however, C. A. Needham, one of the directors and the secretary of the company, had conceived the scheme of purchasing the stock of the company and dividing the property thereof with one Springer, who agreed to supply the money for the purpose of securing the stock. By the date of the adjourned meeting all of the stock of the company had been purchased by Needham, with the exception of that owned by Yerkes, and with the further exception of certain shares owned by one Pullman, upon which Needham had secured an option. At the meeting Pullman offered to purchase the stock of Yerkes at a valuation placed upon it by Yerkes himself some time previous. Pullman was acting as the agent of Springer in making the offer, though this fact was unknown to Yerkes at the time. Yerkes refused the offer. No action was taken at this meeting with regard to a sale of the property of the stockholders. The president and secretary, who were Pullman and Needham, respectively, were authorized to mortgage or sell the property of the company at their discretion. The stock of Yerkes was voted against this proposition. Acting under this authority the property was sold to Needham and Springer; the deed of the real estate and the bill of sale of the personal property being made out to Rose Abernethy, a niece of Springer, but both deed and bill of sale being delivered to him personally. At an adjourned meeting of the stockholders this sale was approved against the vote of the stock of Yerkes.[38]

SCHOLFIELD, J. From the foregoing statement it is clear that when Needham entered into the contract with Springer the former was a director in the Chicago Hansom Cab Company, and its secretary. As director, he owed the duty to the company to preserve its property and protect the company against loss, so far as that could be done by the exercise of ordinary care and diligence; and he could not himself become the purchaser of any property of the corporation which it was his duty to sell. Wardell v. Railroad Co., 103 U. S. 651, 26 L. Ed. 509. The contract between Needham and Springer requires the purchase of all the property of the cab company, and the subsequent transfer of the personal property to Needham. It is an entire and indivisible contract, and Needham is therefore directly interested in every part of the claimed contract of sale by the company to Springer.

But it is claimed the authority to make this sale is derived from a vote of a majority of the stockholders. That vote was given at the stockholders' meeting on the 6th of May, 1889, in these words: "Therefore, be it resolved that a committee consisting of the president and secretary be appointed to mortgage or sell all or part of the property of the company, at their discretion, and be authorized to sign, seal, and deliver any mortgage, deed, or bill of sale necessary, and to report at an adjourned meeting May 8th, at 2:30 P. M., at the same place." This required the exercise of judgment and discretion

[38] A short statement has been substituted for that in the original report.

by both the president and the secretary; and, being a special power, it could not be exercised by one only. Perry, Trusts, § 413. And so, necessarily, if one was disqualified to act, neither could act. The resolution of the stockholders invested Needham, as well as Pullman, with a special confidence and trust, which required that he should act solely with a view to the best interests of all the stockholders. But he was disqualified to thus act by reason of his previous contract with Springer, which gave him a personal interest to be promoted by his action under the resolution. The rule is familiar that a trustee is disqualified to act by the intervention of a personal interest in the performance of his duties as trustee. He cannot obtain title to property where he has a duty to perform inconsistent with the character of a purchaser on his own account. Borders v. Murphy, 125 Ill. 577, 18 N. E. 739.

It is, however, contended that this sale was ratified by a vote of a majority of the stockholders at their meeting on the 8th of May. Whether, in any case, a ratification is effective, depends upon whether those assuming to ratify might have legally authorized the act to be done in the first instance. At the time this vote was taken, Springer either really owned or had contracted to purchase, and by virtue thereof was entitled to and did control, a majority of the shares of stock,—indeed, all except those owned by Yerkes; and so upon the record of the meeting of the 8th of May the names and votes of Pullman, Himrod, Hagerty, Cotton, and Cutler, being the votes in favor of the ratification of the sale, are but another form of expressing the name and votes of Springer in favor of it. The question is therefore presented whether, after it is determined to wind up a corporation and settle its business, it is competent for a holder of a majority of its shares of stock to make or ratify a sale of all its property to himself, against the protest of a holder of a minority of its shares, and in disregard of his rights.

That a holder of a majority of the shares of stock in a corporation may, where the law authorizes a vote of stockholders, so vote upon any matter of policy in the conduct of the corporation as to best subserve his own interests, and that this may relate to the ceasing to do corporate business, the winding up of its affairs, and the sale of its property, we do not question. But the authorities cited by counsel for appellant (Gamble v. Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527, and Transportation Co. v. Beatty, L. R. 12 App. Cas. 589) concede that even in such cases the action resulting from such vote must not be so detrimental to the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of, and in opposition to, the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or a fraudulent destruction of the rights of such minority.

In the cases cited, and, so far as we are informed, in all other cases where the majority of the stockholders may by their votes lawfully affect the interests of the minority of the stockholders, the interests of the minority, are, theoretically at least, protected, either by directors or trustees of the corporation, who it will not be presumed will betray their trust by acting in the interest of one stockholder to the prejudice of another, or by reason of the transaction being such as is presumed to be alike beneficial to all stockholders, as where the corporate property is in good faith appropriated to the payment of the corporate debts, or is sold at a fair sale; and no case cited or within our knowledge goes to the extent of holding that a majority of the stockholders may take the property of the corporation, and retain it, if the minority shall elect to deny its right to acquire title to it in that way. Undoubtedly, if in such case the minority of the stockholders shall elect to treat the majority as purchasers, they may do so, and require them to account for the value of the property. Here Springer, who, through Pullman, Himrod, Hagerty, Cotton, and Cutler, assumes to ratify this sale, is the same Springer who, with Needham, is the purchaser of the property. In other words, he assumes to ratify a sale to himself. But a man cannot be both buyer and seller in the same transaction; and, where he assumes to be such, his action simply amounts to a taking of the property, and would be quite as valid without as with the circumlocution of the form of a sale through dummies.

The right of a majority of the stockholders to sell the corporate property can by no reasonable construction be held to involve the right to seize the property to their own use. A sale conducted, as it must be, fairly and openly, cannot theoretically operate to the prejudice of one stockholder more than to another. There is in such case no presumptive antagonism between the different stockholders. But where, under pretense of a sale to themselves, the majority seize the property, and undertake to invest themselves with title, their interests are wholly hostile; for the gain of the one is the loss of the other.

It is a general rule, administered by courts of equity, that where one person has the power of disposition of the property of another, without the consent of that other, he shall not be allowed to become personally interested in it himself; and this without regard to any question of fairness in the immediate transaction, for he shall not be allowed to occupy a position where self-interest would tempt a betrayal of duty. This rule is plainly applicable here, and it has been so applied in adjudicated cases. It is said in Cook, Stocks, § 656: "It is illegal and fraudulent for the majority of the stockholders to purchase the property of the company at a sale authorized by themselves. Such a purchase by the majority may be set aside in the same way and to the same extent that a purchase of corporate property by a director may be set aside." See, also, 2 Bigelow, Frauds, p. 645,

where it is said: "No act of the majority can purge the fraud" of appropriating the common property to their own benefit by any portion of the corporators. And to like effect is the ruling in Meeker v. Iron Co. (C. C.) 17 Fed. 49; Ervin v. Navigation Co. (C. C.) 20 Fed. 577. And see, also, Menier v. Telegraph Works, 9 Ch. App. 350; Brewer v. Boston Theater, 104 Mass. 378; Preston v. Dock Co., 11 Sim. 327; Hodgkinson v. Insurance Co., 26 Beav. 473; Atwool v. Merryweather, L. R. 5 Eq. 464, note.

The action of the board of directors on the 8th of June, as affecting the validity of the sale, is not, under the pleadings, properly before us for consideration. Counsel for appellants are mistaken in saying, as they do, that appellee, in his supplemental bill, relies upon it. The allegation of the supplemental bill, to which reference is made, is this, only: "Your orator further shows that a majority of the stockholders of said corporation having resolved to discontinue the business of said corporation, the directors of said corporation, since the filing of said bill, have ratified such action of the majority of the stockholders." There is no reference whatever to the sale of the property. "Such action" means plainly the resolution to discontinue the business of the company.

We think it unimportant whether the money furnished by Springer, and used by Needham, in purchasing the stock of the corporation and in paying for the property claimed to be purchased from it, was that of Rose Abernethy, as said by Springer, at the time he began negotiating with Needham, or whether, as the evidence strongly tends to prove, it was in fact that of Springer; for in either view the money was furnished and used, as is shown, in performance of the contract between Needham and Springer, and Rose Abernethy can, therefore, only take subject to that contract, and she must be affected by whatever has been done by Needham and Springer to acquire title to the property.

It appears from the evidence that the directors of the corporation were in the interest and under the control of Springer, so that a demand upon the corporation to bring suit against him would have been unavailing; and the suit is therefore properly brought by Yerkes. City of Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899.

We are unable to perceive any sufficient reason for reversing the decree below. It is therefore affirmed.[84]

[84] Accord: Ervin v. Oregon Railway & Navigation Co. (C. C.) 27 Fed. 625 (1886); Farmers' Loan & Trust Company v. N. Y. & N. R. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689 (1896).

SIMPSON v. DIRECTORS OF WESTMINSTER PALACE HOTEL CO.

(House of Lords, 1860. 8 H. L. Cas. 712.)

In June, 1857, a company was formed under the provisions of the Joint Stock Companies Act, 1856, to erect and maintain a great hotel for purposes set forth in a prospectus. So far as they are material to be considered in this case, they are the following: The third article of memorandum of association declared that "the objects for which the company is established are the purchase of leasehold lands in the city of Westminster, the erection, furnishing, and maintenance of an hotel thereon, the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects."

The 32d article contained, among others, these terms: "The directors shall, subject to the powers of the general meetings, have the entire management of the company, and they shall have power to enter into, alter, or rescind contracts in such manner as they shall think fit. And also to incur debts in the ordinary course of business, and to issue bills of exchange and promissory notes, and also to advance upon security any money which may be in their hands and not immediately required for the purposes of the company, and generally to do all acts, matters, and things which are necessary for carrying on the business of the company."

There was a plan of the building issued, and attached to it was the following explanatory note: "There are, therefore, two hundred and fifty-seven rooms for the occupation of visitors, independently of the coffee rooms (one for ladies), arbitration rooms, the library, billiard, and smoking rooms, and the suite intended to be set apart for a proposed engineers' club. The grand total, including the offices, being four hundred and fifteen rooms."

The appellant became a holder of fifty shares in this company. In the early part of 1860, when the building was nearly completed, an offer was made on behalf of Sir C. Wood, then Secretary of State for India, to take on a lease a part of the hotel. For this purpose the proposals stated (article 5): "The building is to be adapted to the uses of the Secretary of State for India agreeably to the plans of Mr. Wyatt." Article 10: "The Secretary of State to take for three years certain, with the option on his part only of remaining for one or two years beyond the first three years of occupation. Notice of his intention to exercise or vacate his option must be given by the Secretary of State to the Westminster Palace Hotel Company, six months at least previous to the expiration of the original term of three years."

Article 13: "The Secretary of State to afford the Westminster Palace Company, limited, a monopoly (during the tenancy by the Secretary of State of the portion of the hotel now agreed for) for the sup-

ply of the premises so occupied with provisions, beer, wine, liquors, and refreshments, the whole to be supplied of equal quality and at similar prices to those now sanctioned in her Majesty's Treasury offices; and if in the exercise of this monopoly any difference should arise between the parties, the same is to be submitted to the arbitration of Mr. William Moseley and Mr. M. Digby Wyatt, who are previously to proceeding to appoint an umpire to decide any difference which may arise between them."

And subject to the conditions of the agreement, the Secretary of State for India was to pay an annual rent of £6000. The rent was to commence from the date of his being put into complete possession. The directors accepted these terms. About 21/47ths of the whole building was thus made the subject of the lease. Differences of opinion arose among the shareholders as to the propriety and as to the legality of such a disposal of part of the hotel, and an extraordinary general meeting of the whole body was held, when the act of the directors was affirmed, upon a poll, by 1690 to 1345 votes.

The appellant afterwards filed his bill, praying that the agreement might be declared invalid, and for an injunction and general relief. Evidence was taken on both sides. The cause was heard on motion for an injunction, which was treated as a hearing on a motion for a decree, and Vice-Chancellor Wood made an order dismissing the bill. On appeal to the Lords Justices, Lord Justice Knight Bruce was of opinion that it should be affirmed. Lord Justice Turner thought that an injunction ought to issue.

The order, therefore, stood affirmed. The appeal was then brought.

THE LORD CHANCELLOR (Lord CAMPBELL). I think that this case is to be determined on the principle laid down by Mr. Giffard, in his very able argument for the appellant; and I bow to the authority of Natusch v. Irving, and the other decisions to which he referred. The funds of a joint-stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is ultra vires, and although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a Court of equity will interpose on his behalf by injunction. A railway company cannot apply its funds to make a line of railway different from that described in the Act by which the company was constituted; a company established for granting fire and life insurances cannot engage in marine insurances; a company established to make a railway, and exercise the trade of carriers upon the line from one town in England to another, cannot add to it the trade of a steam packet company; and no company can ever abandon the business for which it was established, and undertake another.

Nevertheless, I cannot say that Vice-Chancellor Page Wood and Lord Justice Knight Bruce were wrong in holding that this agreement between the Westminster Hotel Company and the Secretary of State for India is not ultra vires; for I think that under this agreement the

directors do not abandon the undertaking for which the company was established, and they cannot be said to engage in any new undertaking.

I agree that the case depends upon the fair construction of the third article of the Memorandum of Association. There is a difficulty in saying, that the letting of so large a portion of the hotel to the Indian Board for so long a time is "carrying on the usual business of an hotel or tavern therein," but I conceive that it is (in the words of the third article) doing a thing "otherwise conducive to the attainment of the described objects of the undertaking." An hotel, to be used as such, still remains in the hands of the Company. This hotel is larger than any other hotel in England, and in this portion of the building the usual business of an hotel and tavern is to be carried on. Mr. Ellis, the experienced hotel-keeper, who is to carry it on, swears that, in his opinion, it can be more advantageously carried on in this manner, than if the whole building were from the first put under his management as master of the establishment. I rely much upon the consideration that the arrangement is temporary and preliminary, and conducive to the ultimate object of the whole building being devoted to the proper business of the hotel. From the large rent immediately to be received by the company for the occupation of the one hundred and sixty-nine rooms by the India Board; from the monopoly to be enjoyed by the company in supplying so many persons with refreshments; and from the fashionable reputation to be conferred upon the hotel by this association, the opinion expressed by the majority of the shareholders, that the arrangement is beneficial to them, is likely to be verified. This anticipation would not be sufficient, if the original undertaking had been abandoned, or if there was any extension of the original undertaking; but as there is neither abandonment nor extension of the original undertaking, and the arrangement may assist, instead of obstructing the prosecution of the original undertaking, I must advise your Lordships to affirm the decree appealed against.

Should your Lordships concur in this opinion, I would farther advise that the appeal be dismissed without costs; for the appellant like the respondents, appears to have acted with perfect good faith; and considering the division of opinion in the first Court of Appeal to which he resorted, he was fully justified in bringing the question to be determined by your Lordships.

Decree affirmed.[88]

[88] The concurring opinions of Lords Cranworth, Chelmsford, and Kingsdown have been omitted.

NEW ORLEANS, J. & G. N. R. CO. v. HARRIS.

(High Court of Errors and Appeals of Mississippi, 1854. 27 Miss. 517.)

A charter to construct a railroad was granted by the legislature of the state to a company styled the Canton, Kosciusko, Aberdeen & Tuscumbia Company. After the granting of said charter, the legislature passed an act which authorized the company to assign to the New Orleans, Jackson & Great Northern Railroad Company all the rights, powers, privileges, franchises, immunities and exemptions then owned and possessed by said company, by virtue of their charter, and of any other act passed by the legislatures of the states of Mississippi and Alabama, as well as the stock subscribed to the first named company upon such terms as should be agreed on by the boards of directors of both companies. By a provision to this act it was not to take effect unless accepted and approved by the stockholders representing a majority of the stock subscribed to said company, at a meeting of the stockholders called specially for that purpose. Such a meeting was called and the act was accepted and approved accordingly. In accordance with such action a transfer was duly made. The defendant was a subscriber to the first company. To a complaint in an action brought against the defendant as a stockholder in the New Orleans, Jackson & Great Northern Railroad Company for unpaid calls, alleging the foregoing facts and the further fact that the assignment was made with the knowledge and consent of the defendant, the defendant demurred. The demurrer being sustained, and the plaintiffs refusing to plead further, final judgment was rendered in favor of the defendant, whereupon the plaintiffs sued out their writ of error.[36]

SMITH, C. J.[37] * * * The object of the transfer and assignment, and the agreement entered into by the respective companies, and the necessary effect of these transactions, on the supposition of their validity, was to make the defendant, to all intents and purposes, a stockholder in the New Orleans, Jackson, and Great Northern Railroad Company; to vest him with all the rights and immunities, and to subject him to all the duties and responsibilities which attached to that relation. If the transfer and assignment were valid, the defendant thereby became bound for the payment of his stock to the plaintiffs, and his liability is sufficiently alleged in the first count of the complaint.

Our inquiry, therefore, must necessarily, in the first place, be directed to the authority and power of the respective companies, as defined in the acts of incorporation; to the capacity of the one to make the transfer and assignment; and to that of the other, to accept of it.

[36] A short statement of facts, taken largely from the headnotes, has been substituted for that contained in the opinion.

[37] Part of the opinion is omitted.

It is very manifest that if neither corporation possessed the requisite authority and power to make the transfer and assignment valid and effective, the whole transaction was simply void. No rights were either transmitted or acquired under it. Upon the supposition that the transfer and assignment were void for the want of power in the parties to it, it is clear that the assent of the defendant to the transfer could not have the effect to render him liable to the plaintiffs upon the facts alleged in the second count of the complaint. As the very foundation of the asserted claim was, that by virtue of the transfer and assignment, the corporate existence of the Canton, Kosciusko, Aberdeen, and Tuscumbia Railroad Company, was put an end to, and that the New Orleans, Jackson, and Great Northern Railroad Company were invested, fully and to the same extent, with all its rights, immunities, and franchises, as the same were held and possessed by it before the transfer; and that being so invested with said rights, immunities, and franchises, they were authorized to demand and recover the claim in controversy. But if the objection, based upon the want of power in these corporations, shall be found not to apply to the former, it will be necessary to determine whether the assent given to the transfer by the defendant, made him liable upon the said second count in the complaint.

It is not controverted that the Canton, Kosciusko, Aberdeen, and Tuscumbia Company, under its charter granted on the 3d of April, 1852, were incapable of making the alleged transfer and assignment. But it is insisted, that ample power and authority for that purpose was conferred by the act of the legislature of this State, approved on the 9th of October, 1852.

By reference to this act it will be seen that by the first section the said company were authorized and empowered to assign, transfer, and set over to the New Orleans, Jackson, and Great Northern Railroad Company, all of the rights, powers, privileges, franchises, immunities, and exemptions (then) owned and possessed by said company by virtue of their charter and of any other acts passed by the legislatures of the States of Mississippi and Alabama, as well as the stock subscribed to said company, upon such terms and conditions as should be agreed upon by the board of directors of the said companies. By a proviso the said act "was not to take effect unless accepted and approved by the stockholders representing a majority of the stock subscribed to said company at a meeting of stockholders called specially for that purpose." It was alleged in the complaint that this act was duly accepted and approved in the mode prescribed.

It will not be questioned, if it was within the competency of the legislature to direct in what manner the proposed amendment of their charter was to be approved and accepted by the stockholders, that the power conferred under the act was altogether sufficient to authorize the contemplated transfer and assignment.

If the legislature possessed the authority to confer upon any number of the stockholders in said company, who might be the owners of a majority of the stock, the power to accept any proposed amendments to the charter, and by such acceptance to bind the remainder of the stockholders, it might with equal propriety, so far as the isolated question of power was concerned, delegate the same right to a minority, owning but a small proportion of the stock, or to any specified number less than a majority, or even to a single corporator. A charter is a contract, within the meaning of the constitution of the United States, between the State granting the charter and the corporation itself, the obligation of which it is not within the power of the legislature to impair. The contract subsisting between the members of a corporate body and the corporation is equally within the protection of the constitution. According to the doctrine that the legislature had the right to confer upon any number of the stockholders, who might own more than one half of the stock subscribed, the authority to accept of amendments to the charter, it is evident that the charter might be altered in its most essential stipulations, not only without the approbation but against the consent of the great body of the corporators, thereby subjecting them to duties and responsibilities not imposed by their contract with the company. This, we think, cannot be done without a clear violation of the constitution. Hence, we conclude that the act in question did not invest the stockholders representing a majority of the stock subscribed with authority to accept the amendment proposed to the charter.

The charter is silent as to the method in which amendments thereto may be accepted by the stockholders. But it will not be questioned, that the power to accept of any alterations and amendments to the charter, proposed by the legislature, and which may be deemed by the members necessary or beneficial, exists, whether such power be regarded as incident to their corporate character, or as belonging to them as members of the community. Disregarding, therefore, the provision directing the mode in which the amendatory act was to be approved and accepted, we come to the question, Whether the acceptance of the amendment, as alleged, was a valid act, binding the company?

Incorporated companies are subject to the same principle which prevails in the community at large, that the acts of the majority, in cases within their charter powers, are obligatory on the minority. The general rule on the subject is well expressed by Ch. J. Tilghman. He says: the fundamental principle of every association for self-government is, that no one shall be bound, except with his own consent, expressed by himself or by his representatives; but actual assent is immaterial; the assent of the majority being the assent of all; and this is not only constructively but actually true; for that the will of the majority shall in all cases be taken as the will of the whole is an implied, but an essential stipulation, in all associations of this sort. In

re St. Mary's Church, 7 Serg. & R. [Pa.] 517. When the charter has made no provision on the subject, this is unquestionably the rule, in regard to all acts authorized by the fundamental law, performed in execution of the objects of the incorporation. But it cannot be said that the acceptance of the amendatory act was a matter connected with the business, or designed to promote or carry into effect the objects for which the company was chartered. On the contrary, it looked to the destruction of its franchises and the utter extinction of its corporate existence. And this object was to be effected not by a surrender, in which case the primary objects of the incorporation would be abandoned, and the stockholders discharged of their corporate duties and liabilities; but by an assignment and transfer, to another company, of its immunities, franchises, and of the stock subscribed; under the operation of which the stockholders would, also, be transferred and subjected to the performance of contracts to which they had never assented. Here it is manifest the general rule in regard to acts performed within the scope of the charter powers, does not apply. A different principle must be resorted to in order to uphold, if it can be sustained, the position that the alleged approval and acceptance bound the company.

The rule is unquestioned that, in partnerships and joint-stock associations, the fundamental articles of copartnership or association cannot be altered by a vote of the majority against the consent of the minority, unless there is an express or implied provision in the articles themselves, that they may do it. Natuzeh v. Irving et al., Gow on Part. 576; Livingston v. Lynch, 4 J. Ch. R. [N. Y.] 573. This principle is equally applicable to incorporated companies. The charter in these cases constitutes the fundamental articles of the association. It defines the rights and powers of the corporation, determines its objects, and fixes the individual contract of the member with the corporation itself. His contract is as clearly defined as the charter can make it. It must be conceded, that the legislature have no constitutional power, unless reserved in the grant, to change or alter, without consent, an act of incorporation, and thereby to cast upon them additional obligations, or take from them rights guaranteed by their charter. Its power over the corporator can be no greater; it can impose no additional obligation without his assent; or release him from any duty, against the will of the party thereby to be affected. In what respect can the power of a majority of a corporation transcend the authority of the legislature? He must have as perfect a right to stand upon his contract with the corporation in opposition to the action of a majority, as he would to insist upon his rights under it against the action of the legislature. This is a proposition too clear to be doubted, in all cases in which there is no stipulation, express or implied: that he shall be bound by the voice of the majority.

The incapacity of the majority to alter, fundamentally, the charter against the consent of even a single corporator, was recognized by the

vice-chancellor in the case of Cunlif v. The Manchester and Bolton Canal Company, 13 Eng. Ch. R. 131, note. In that case an injunction was granted upon the application of a single shareholder in an incorporated company, restraining the company from affixing their corporate seal to a petition to parliament for an act to convert a part of the canal into a railway, and from using the corporate funds for that purpose. So in Manly against the same company, an injunction was granted for a similar purpose. Ib. 132. So also in Ware v. The Grand Junction Water Company, 2 Russ. & Mylne, 461, the same principle was applied to a corporation upon the application of a single shareholder. It is true, on appeal, the injunction granted by the vice-chancellor was dissolved by Lord Brougham, so far as the company were restrained by it from petitioning parliament for an act to authorize the contemplated change in the charter. But the decision of the lord chancellor cannot be considered here as an authority against the principle contended for, as his decree seems to have been based upon the ground that the alteration, if made, would not affect, radically, the organization of the company, or upon the ground that the power of parliament over the subject was unrestricted. To the same effect is the very learned and able opinion of the chancellor, delivered in the recent case of Stevens v. Rutland & Burlington Railroad Company, 1 Am. Law Reg. 154.

There can be no doubt, under the uniform decisions of the courts in this confederacy, that the acceptance of the amendatory act, in the manner it was averred to have been made, could not bind the stockholders who did not assent to it. But the question is not one of assent, as applied to the individual corporators, but one of power in the stockholders possessing a majority of the stock to accept a legislative amendment which would produce a fundamental change in the stipulations of the charter. The amendatory act imposed no obligation upon the company. It vested in the corporation no right which it did not possess under its charter. It amounted simply to a legislative permission to accept the amendment, if it should choose to do so, and could consistently with its charter rights and obligations. No case has been brought to our attention, in which it was directly decided that the acceptance of an amendment of this character, by a majority of the corporators, was absolutely void as to the corporation itself. In all the cases we have examined, the decision turned upon the question of the individual consent of the party charged or affected by the alteration. Generally, an act performed without any authority whatever is absolutely void. The principle applied to corporations is, that they possess only the powers which are specifically granted by the act of incorporation, and such as are necessary to carry into effect the powers expressly granted. 2 Kent, Com. 298.

In this case it is not pretended that the stockholders representing a majority of the stock were expressly, under the charter, vested with the power to accept of amendments thereto of the character of that

under consideration; and it is impossible to conceive that it existed on the part of even a majority of the whole of the stockholders, as an implied right. Such a doctrine is repugnant to the principles of sound sense and common justice. When a person becomes a member of an incorporated company by his subscription to the stock, he agrees to be bound by the terms of his contract, as defined in the charter of incorporation; he agrees to be bound by the acts of the corporation and its officers, performed within the scope of the charter powers; but upon no principle can it be held that he impliedly consents to any alteration which would work a radical change in the structure of the association, which might be voted or accepted by even a majority of the whole of the corporators, and thereby be subjected to burdens and obligations wholly foreign to the purposes and objects of the original charter. It is our opinion, therefore, that the act of acceptance was absolutely void for want of power on the part of the stockholders representing a majority of the stock to vote an acceptance of the amendatory act. It follows hence that the transfer and assignment were also void and ineffectual.

But it is insisted that the defendant is bound by his assent to the transfer and assignment, and that the plaintiffs were entitled to a recovery upon the second count.

The ground upon which he must be held liable, if bound at all, is that by virtue of his subscription to the stock of the Canton, Kosciusko, Aberdeen, and Tuscumbia Railroad Company, he became bound to pay the calls upon his stock, as alleged, to said company; that his stock and his incidental obligation, together with the rights, immunities, and franchises of the company were transferred to the New Orleans, Jackson, and Great Northern Railroad Company; and that, under the operation of the assignment, the defendant became a stockholder in said company to the amount of his subscription to the stock of the former company, and as such is liable.

Upon the principle laid down in regard to the assignment, it is clear that the rights of neither party to it were in anywise affected. The act of transfer was void; the assignors parted with no right or immunity; the assignees acquired nothing. The defendant remained a stockholder in the company for whose stock he had subscribed, and as such was liable to the same extent after the attempted transfer as before the attempt was made. It is impossible to conceive that the assent of the defendant could bind him, unless his assent to the transfer rendered it effectual for the purposes intended, or unless upon some consideration passing from the assignees to him, outside of the transfer, he should be estopped from denying its validity. The only consideration, or in other words, the only ground for his liability alleged was, that the transfer in law and in fact made him a stockholder in the company to the extent of his subscription to the stock in the Canton, Kosciusko, Aberdeen, and Tuscumbia Company. It was not averred that he became a stockholder in any other way than through

the said assignment and transfer, made with his knowledge, approbation, and consent. His assent did not and could not impart validity to a transaction in itself void. This, we presume, will not be controverted. He did not therefore become, in virtue of the transfer and assignment, a stockholder in the company suing in this action; consequently, no sufficient ground was shown in either count, whereon the defendant was chargeable.[88]

Judgment affirmed.

MOWER v. STAPLES et al.

(Supreme Court of Minnesota, 1884. 32 Minn. 284, 20 N. W. 225.)

BERRY, J.[89] By Sp. Laws 1876, § 3, c. 230, it is provided that the board of directors of the St. Croix Boom Corporation shall consist of five members. The section was amended by section 1, c. 87, Sp. Laws 1883, so as to provide that the board of directors shall consist of nine members.

The charter of a private corporation being a contract between the state and the corporators, and between the corporators themselves, (Mor. Priv. Corp. §§ 149, 198,) and therefore constitutionally protected from impairment against the will of the corporators, it is not questioned that, to become binding and effectual, an amendment must be accepted on their part. This general proposition is, to some extent, subject to an exception in favor of the right of the state to amend a charter under an express reservation of authority to do so, or in the exercise of its police power.

The question presented by this case is whether the legislative amendment increasing the directors from five to nine can be effectually accepted so as to become a part of the charter, by a majority of the stock, (each share being entitled to one vote under the charter,) over the objection of a minority. We are of opinion that this question is to be answered in the affirmative. Without exception, so far as we have been able to discover, the courts, and, with a single exception, the text-writers, are agreed that alterations in a charter which are not "fundamental," and are authorized by the legislature, may be effectually accepted by a majority of the stockholders. By a majority of stockholders we understand a majority per capita, when the right to vote is per capita, and a majority of the stock, where, as in the present instance, each share of stock is entitled to one vote. Alterations which materially change the nature and purposes of the

[88] Accord: Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304 (1894); Stevens v. Rutland & B. R. Co., 29 Vt. 545 (1851).

Compare: Bish v. Johnson, 21 Ind. 299 (1863); Mowrey v. Indianapolis & C. R. Co., 4 Biss. 78, Fed. Cas. No. 9,891 (1866); Dow v. Northern Ry. Co., 67 N. H. 1, 36 Atl. 510 (1886).

[89] Dickinson, J., because of illness, took no part in this decision.

corporation, or of the enterprise for the prosecution of which it was created, are fundamental, while those which work no such material change are not fundamental.

In support of these propositions we cite the following authorities: H. & N. H. R. Co. v. Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; Stevens v. R. & B. R. Co., 29 Vt. 546; Curry v. Scott, 54 Pa. 270; K. R. & R. I. R. Co. v. Marsh, 17 Wis. 13; Pierce, R. R. 66 et seq.; Nugent v. Sup'rs, 19 Wall. 241, 22 L. Ed. 83; Everhart v. W. C. & P. R. Co., 28 Pa. 339; N. H. & D. R. Co. v. Chapman, 38 Conn. 56; Joy v. J. & M. Plank-road Co., 11 Mich. 156; Clearwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604; Union Locks & Canals v. Towne, 1 N. H. 44, 8 Am. Dec. 32; Martin v. Railroad Co., 8 Fla. 382, 73 Am. Dec. 713; Witter v. M., O. & R. R. R. Co., 20 Ark. 463; Hester v. M. & C. R. Co., 32 Miss. 378; Winter v. Muscogee R. Co., 11 Ga. 438; Hoey v. Henderson, 32 La. Ann. 1069; Banet v. Alton & S. R. Co., 13 Ill. 504; Zabriskie v. H. & N. Y. R. Co., 18 N. J. Eq., 178, 90 Am. Dec. 617; Mowrey v. I. & C. R. Co., 4 Biss. 78, Fed. Cas. No. 9,891; Field, Corp. §§ 81, 388.

The principle upon which these cases appear to go is that alterations, or, as they are sometimes called, amendments, which do not change the nature, purpose, or character of a corporation or its enterprise, but which are designed to enable the corporation to conduct its authorized business with greater facility, more beneficially, or more wisely, are auxiliary to the original object, and that, therefore, when one becomes a stockholder, he impliedly assents that such alteration or amendment may be made. Stevens v. Railroad Co., supra; N. H. & D. R. Co. v. Chapman, supra; Banet v. A. & S. R. Co., supra; H. & N. H. R. Co. v. Croswell, supra; Kenosha R. Co. v. Marsh, supra; Joy v. J. & M. Plank-road Co. supra. We may add, what appears to be an obvious consideration, that, if no alteration or amendment of a corporate charter can be made even in matters of administrative detail, or as to the means and agencies through which the corporate enterprise shall be carried on except with the consent of every stockholder, the result would be not only great public and private inconvenience, but, in many cases a complete practical failure of the enterprise itself. Certainly this is not in accordance with the understanding nor the practice of the courts, of the profession, or of those who have been engaged in carrying on our great corporate undertakings.

The alteration proposed in the present case, by increasing the number of directors from five to nine, is clearly not fundamental, within the definition above given and sanctioned by the authorities cited. It in no way changes the nature or purpose of the boom company, or of the enterprise for which it was created. It is a change respecting modus operandi merely; a change, not of the nature or purpose or character of the company, or of the company's enterprise, but a

change of the instrumentalities and agency,—the machinery by which that purpose is to be effected and that enterprise carried on.

Everhart v. W. C. & P. R. Co., supra, was a case in which a charter amendment providing for the election of three additional managers, i. e., directors, was upheld. N. H. & D. R. Co. v. Chapman, supra, was a case of an amendment authorizing two of the directors to be appointed by the city of New Haven a subscriber for stock. Joy v. J. & M. Plank-road Co., supra.

It is argued that if the four additional directors are elected it will be in the power of the board, and the board will manage the business of the corporation for the private advantage of some of the directors, and against the interest of the corporation and of the stockholders, and particularly of this plaintiff. We see no reason why this might not be done with five, the present number of directors. The plaintiff owns a little over one-third of the shares. Although this makes him a large stockholder, he is still in the minority. But the danger apprehended is common to all corporations, and the remedy lies, not in withholding the power to make amendments to the charter, but in enforcing the responsibility of the directors for abuse of trust. They have no right to run the corporation for the individual benefit of any of their number, to the detriment of the stockholders, and if they do or attempt to do this, the law furnishes a remedy, as in other cases of abuse of trust or disregard of legal duty. Pierce, R. R. 43, and cases cited; Ewell's Evans, Ag. [276.]

For these reasons we think it is competent for the majority of the stock of the St. Croix Boom Corporation to effectually accept the amendment increasing the number of directors from five to nine, and the order dissolving the temporary injunction obtained is accordingly affirmed.

SECTION 3.—REPRESENTATIVE SUITS

SMITH v. HURD.

(Supreme Judicial Court of Massachusetts, 1847. 12 Metc. 371, 46 Am. Dec. 690.)

This was a special action on the case, by a stockholder of the Phœnix Bank, against those who were directors of the said bank, for several years next before and at the time of the failure of said bank, in October, 1842. There were two counts; one founded in nonfeasance of official duty, the other in misfeasance. * * *

The defendants demurred to the declaration, and the plaintiff joined in demurrer.[40]

[40] Part of the statement of facts is omitted.

SHAW, C. J. This is certainly a case of first impression. We are not aware that any similar action has been sustained in England, or in any of the courts of this country. It is founded on no statute. It is an action on the case, at common law, brought by an individual holder of shares in an incorporated bank, against the directors, not including the president, setting forth various acts of negligence and malfeasance through a series of years, in consequence of which, as the declaration alleges, the whole capital of the bank was wasted and lost, and the shares of the plaintiff became of no value. The circumstance that no such action has been maintained would certainly be no decisive objection, if it could be shown to be maintainable on principle. But the fact, that similar grievances have existed to a great extent, and in numberless instances, where such an action would have presented an obvious and effective remedy, affords strong proof, that in the view of all such suffering parties, and their legal advisers and guides, there was no principle on which such an action can be maintained.

If an action can be brought by one stockholder, it may be brought by the holder of a single share; so that for one and the same default of these directors, thirty-five hundred actions might be brought. If it may be sustained by proof of an act, or series of acts, of carelessness, neglect, and breach of duty in managing the affairs of the bank, by which the whole value of the stock is destroyed, it may, on the same principle, be maintained on any act or instance of such negligence, by which the shares are diminished in value, fifty, ten, five or one per cent. Still, notwithstanding these consequences, if the plaintiff has a good right of action, upon recognized and sound legal principles, his action ought to be sustained.

But the court are of opinion that the action cannot be maintained; and that on several grounds, a few of the more prominent of which may be alluded to.

1. There is no legal privity, relation, or immediate connection, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents, or trustees of such individual stockholders. The bank is a corporation and body politic, having a separate existence as a distinct person in law, in whom the whole stock and property of the bank are vested, and to whom all agents, debtors, officers, and servants are responsible for all contracts, express or implied, made in reference to such capital, and for all torts and injuries diminishing or impairing it. The very purpose of incorporation is, to create such legal and ideal person in law, distinct from all the persons composing it, in order to avoid the extreme difficulty, and perhaps it is not too much to say the utter impracticability, of such a number of persons acting together in their individual capacities. The practical difficulty would be nearly as

great whether it were held that all must join in an action to recover damage for an injury to the common property, or that each might sue separately.

The stockholders do, indeed, ordinarily elect the directors; but it is as parts and members of the corporation, in their corporate capacity, in modes pointed out by the charter and by-laws, so that the directors are the appointees of the corporation, not of the individuals. Indeed, I believe there is a provision in the bank charters —there certainly was formerly—which is equally to the present purpose; namely, that the Commonwealth shall be at liberty to add a certain amount to the capital of various banks, and appoint a proportional number of directors. Such directors, so appointed, pursuant to the charter regulating the legal organization of the body, would stand in all respects on the footing of directors chosen by the stockholders. If these were liable to the action of individual stockholders, those would be in like manner.

2. The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent, or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt or discharge a claim, or release damage arising from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined. They are members of an organized body, and exercise such powers as the organization of the institution gives them. Stockholders in banks have a separate right to dividends, when declared, and to a distributive share of the capital stock, if any remains when the charter of the bank is at an end, and its debts paid.

3. But another important consideration is, that the injury done to the capital stock by wasting, impairing, and diminishing its value, is not, in the first instance, nor necessarily, a damage to the stockholders. All sums which could, in any form, be recovered on that ground, would be assets of the corporation, and when collected and received by directors, receivers, or any other persons entitled to receive the same, they would be held in trust, first to redeem the bills and pay the debts of the bank; and it would be only after these debts were paid, and in case any surplus should remain, that the stockholders would be entitled to receive anything. It is, therefore, an indirect, contingent, and subordinate interest, which each stockholder has, in damages so to be recovered against directors. If, upon such indirect, contingent, and remote interest, individual stockholders could recover for the defaults of directors, and especially, as is alleged in

this case, where these defaults have been so great as to sink the capital, a fortiori would the creditors of the bank individually have a right to maintain similar actions; because their claim upon the funds, being prior to that of stockholders, would be somewhat more immediate and direct.

In the same connection, it is obvious to remark, that a judgment in favor of one stockholder would be no bar to an action by a creditor, nor a judgment by both, to an action by the corporation.

4. But it is said, that although the real and personal estate, the securities and capital stock, are, in legal contemplation, vested in the corporation, yet the individual has a separate and distinct property and interest in his particular shares, by any injury to which he may have a separate damage. To some extent, it is true that he has a several interest in his shares; but it is to be taken with some qualifications. Strictly speaking, shares in a bank do not constitute a legal estate and property; it is rather a limited and qualified right which the stockholder has to participate, in a certain proportion, in the benefits of a common fund, vested in a corporation for the common use; it is a qualified and equitable interest, a valuable interest manifested usually by a certificate, which is transferable. To the extent of this separate and peculiar interest, a stockholder, no doubt, might maintain his separate and special action, according to the nature of the wrong done to him in respect to it; as trover or trespass, for the conversion or tortious taking of his certificate; trespass on the case for refusing to make a transfer on a proper occasion; assumpsit for a dividend declared, and the like. But an injury done to the stock and capital, by negligence or misfeasance, is not an injury to such separate interest, but to the whole body of stockholders in common. It is like the case of a common nuisance, where one who suffers a special damage, peculiar to himself, and distinguishable in kind from that which he shares in the common injury, may maintain a special action. Otherwise, he cannot. Co. Lit. 56a; 3 Steph. N. P. 2372; Lansing v. Smith, 8 Cow. (N. Y.) 146.

But we are pressed with the argument, that for every damage which one sustains, which is caused by the wrongful act of another, he ought to have a remedy. This is far from being universally true. Another maxim in regard to claims for damage is, causa proxima, non remota, spectatur. Thousands of instances occur, in which one sustains consequential and incidental damage from the misconduct of another, without a remedy at law. By the misconduct of the officers or agents of a parish, town, county, or even of the State or the Union, defalcations may take place, treasure be squandered and wasted, and all the members of the respective aggregate bodies suffer damage, for which the law, from the nature of the case, can afford no direct remedy. But the true answer to the objection is, that stockholders have a remedy, a theoretic one indeed, and perhaps often in-

adequate, in the power of the corporation, in its corporate capacity, to obtain redress for injuries done to the common property, by the recovery of damages; and each individual stockholder has his remedy through the powers thus vested in the corporation, for the common benefit.

On the whole, the court are of opinion that the demurrer is well taken, and that the action cannot be maintained.

DODGE v. WOOLSEY.

(Supreme Court of the United States, 1855. 18 How. 331, 15 L. Ed. 401.)

This action was begun by bill in equity in the United States circuit court for the district of Ohio to enjoin the collection of a tax assessed by the State of Ohio on the Commercial Branch Bank of Cleveland, a branch of the State Bank of Ohio. The complainant, who was a citizen of Connecticut, was a stockholder in the Branch Bank. He made George C. Dodge, the tax collector, the directors of the bank, and the bank itself defendants. The bill alleged that the law authorizing the tax was unconstitutional, in that it violated the tenth section of the first article of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of a contract. The bill further alleged, and the truth of the allegation was admitted, that the complainant had requested the directors of the bank to take measures, by suit or otherwise, to prevent the collection of the tax, but that they had refused to do so. This refusal was based upon the alleged existence of obstacles in the way of testing the law in the state courts.

The defendant Dodge alone answered. The circuit court rendered a final decree for the complainant, perpetually enjoining the collection of the tax. From that decision the defendant Dodge appealed to the Supreme Court.[41]

WAYNE, J.[42] * * * His counsel have relied upon the following points to sustain the appeal:

1. The complainant does not show himself to be entitled to relief in a court of chancery, because the charter of the bank provides, that its affairs shall be managed by a board of directors, and that they are not amenable to the stockholders for an error of judgment merely. And that in order to make them so, it should have been averred that they were in collusion with the tax-collector in their refusal to take legal steps to test the validity of the tax.

2. It was urged that this suit had been improperly brought in the circuit court of the United States for the district of Ohio, because it is a contrivance to create a jurisdiction, where none fairly exists, by

[41] Statement of facts substituted.

[42] Part only of the opinion is given.

substituting an individual stockholder in place of the Commercial Bank as complainant and making the directors defendants; the stockholder being made complainant, because he is a citizen of the State of Connecticut, and the directors being made defendants to give countenance to his suit.

3. It was said, if the foregoing points were not available to defeat the action, that it might be contended that the defendant was in the discharge of his official duty when interrupted by the mandate of the circuit court, and that the tax had been properly assessed by a law of the State, in conformity with its constitution of the 1st of September, 1851.

We will consider the points in their order. The first comprehends two propositions, namely: that courts of equity have no jurisdiction over corporations, as such, at the suit of a stockholder for violations of charters, and none for the errors of judgment of those who manage their business ordinarily.

There has been a conflict of judicial authority in both. Still, it has been found necessary, for prevention of injuries for which common-law courts were inadequate, to entertain in equity such a jurisdiction in the progressive development of the powers and effects of private corporations upon all the business and interests of society.

It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. Cunliffe v. Manchester & Bolton Canal Company, 2 Russ. & Mylne Ch. R. 480, n.; Ware v. Grand Junction Water Company, 2 Russ. & Mylne, 470; Bagshaw v. Eastern Counties Railway Company, 7 Hare Ch. R. 114; Angell & Ames (4th Ed.) 424, and the other cases there cited.

It was ruled in the case of Cunliffe v. Manchester & Bolton Canal Company, 2 Russ. & Mylne Ch. R. 481, that where the legal remedy against a corporation is inadequate, a court of equity will interfere, and that there were cases in which a bill in equity will lie against a corporation by one of its members. "It is a breach of trust towards a shareholder in a joint-stock incorporated company, established for certain definite purposes prescribed by its charter, if the funds or credit of the

company are, without his consent, diverted from such purpose, though the misapplication be sanctioned by the votes of a majority; and, therefore, he may file a bill in equity against the company in his own behalf, to restrain the company by injunction from any such diversion or misapplication." In the case of Ware v. Grand Junction Water Company, 2 Russell & Mylne, a bill filed by a member of the company against it, Lord Brougham said: "It is said this is an attempt on the part of the company to do acts which they are not empowered to do by the acts of Parliament," meaning the charter of the company; "so far I restrain them by an injunction." "Indeed, an investment in the stock of a corporation must, by every one, be considered a wild speculation, if it exposed the owners of the stock to all sorts of risk in support of plausible projects not set forth and authorized by the act of incorporation, and which may possibly lead to extraordinary losses."

The same jurisdiction was invoked and applied in the case of Bagshaw v. Eastern Counties Railway Company; so, also, in Coleman v. Same Company, 10 Beavan's Ch. Reports, 1. It appeared in that case that the directors of the company, for the purpose of increasing their traffic, proposed to guarantee certain profits, and to secure the capital of an intended steam-packet company, which was to act in connection with the railway. It was held, such a transaction was not within the scope of their powers, and they were restrained by injunction. And in the second place, that in such a case one of the shareholders in the railway company was entitled to sue in behalf of himself and all the other shareholders, except the directors, who were defendants, although some of the shareholders had taken shares in the steam-packet company. It was contended in this case that the corporation might pledge without limit the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability was to increase the traffic upon the railway, and thereby increase the traffic to the shareholders. But the Master of the Rolls, Lord Langdale, said, "There is no authority for anything of that kind."

But further, it is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. And therefore a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied. It is an improper application for a railway company to invest the profits of the company in the purchase of shares in another company. The dividend, says Lord Langdale, in Solamons v. Laing, 14 Jurist for December, 1850, which belongs to the shareholders, and is divisible among them, may be applied severally as their own property; but the company itself or the directors, or any number of shareholders, at a meeting or otherwise, have no right to dispose of his shares of the general dividends, which belong to the particular shareholder, in any manner contrary to the will, or without the consent or authority of that particular shareholder.

We do not mean to say that the jurisdiction in equity over corporations at the suit of a shareholder has not been contested. The cases cited in this argument show it to have been otherwise; but when the case of Hodges v. New England Screw Company et al. was cited against it, (we may say the best argued and judicially considered case which we know upon the point, both upon the original hearing and rehearing of that cause), the counsel could not have been aware of the fact that, upon the rehearing of it, the learned court, which had decided that courts of equity have no jurisdiction over corporations as such at the suit of a stockholder for violations of charter, reviewed and recalled that conclusion. The language of the court is: "We have thought it our duty to review in this general form this new and unsettled jurisdiction, and to say, in view of the novelty and importance of the subject, and the additional light which has been thrown upon it since the trial, we consider the jurisdiction of this court over corporations for breaches of charter, at the suit of shareholders, and how far it shall be extended, and subject to what limits, is still an open question in this court." 1 R. I. 312, 53 Am. Dec. 624,—rehearing of the case September term, 1853.

The result of the cases is well stated in Angell & Ames, paragraphs 391, 393. "In cases where the legal remedy against a corporation is inadequate, a court of equity will interfere, is well settled, and there are cases in which a bill in equity will lie against a corporation by one of its members." "Though the result of the authorities clearly is, that in a corporation, when acting within the scope of and in obedience to the provisions of its constitution, the will of the majority, duly expressed at a legally constituted meeting, must govern; yet beyond the limits of the act of incorporation the will of the majority cannot make an act valid; and the powers of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed, that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors." [43]

[43] So it has been repeatedly decided that a private corporation may be sued at law by one of its own members. The text upon this subject is so well expressed, with authorities to support it, that we will extract paragraph 390 from Angell & Ames entire: "A private corporation may be sued by one of its own members. This point came directly before the court, in the state of South Carolina in an action of assumpsit against the Catawba Company. The plea in abatement was that the plaintiff himself was a member of that company, and therefore could maintain no action against it in his individual capacity. The court, after hearing argument, overruled the plea as containing principles subversive of justice; and they moreover said that the point had been settled by two former cases, wherein certain officers were allowed to maintain actions for their salaries due by the company. In this respect, the cases of incorporated companies are entirely dissimilar from those of ordinary

We have then the rule and its limitation. It is contended that this case is within the limitation; or that the directors of the Commercial Bank of Cleveland, in their action in respect to the tax assessed upon it, under the Act of April 18, 1852, and in their refusal to take proper measures for testing its validity, have committed an "error of judgment merely."

It is obvious, from the rule, that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought; that the pleadings must be relied upon to collect what they are,—to ascertain in what character and to what end a shareholder invokes the interposition of a court of equity, on account of the mismanagement of a board of directors, whether such acts are out of or beyond the limits of the act of incorporation, either of commission contrary thereto, or of negligence in not doing what it may be their chartered duty to do.

This brings us to the inquiry, as to what the directors have done in this case, and what they refused to do, upon the application of their co-corporator, John M. Woolsey. After a full statement of his case, comprehending all of his rights and theirs also, alleging in his bill that his object was to test the validity of a tax upon the ground that it was unconstitutional, because it impaired the obligation of a contract made by the State of Ohio with the Commercial Bank of Cleveland, and the stockholders thereof; he represents in his own behalf, as a stockholder, that he had applied to the directors requesting them to take measures, by suit or otherwise, to prevent the collection of the tax by the treasurer, and that they refused to do so, accompanying, however, their refusal with the declaration that they fully concurred with Woolsey in his views as to the illegality of the tax; that they believed it in no way binding upon the bank; but that, in consideration of the many obstacles in the way of resisting the collection of the tax in the courts of the State, they could not consent to take legal measures for testing it. Besides this refusal, the papers in the case disclose the fact that the directors had previously made two protests against the constitutionality of the tax, because it was repugnant to the Constitution of the United States, and to that of Ohio also, both concluding with a resolution that they would not, as then advised,

copartnerships, or unincorporated joint-stock companies. In the former, the individual members of the company are entirely distinct from the artificial body endowed with corporate powers. A member of a corporation, who is a creditor, has the same right as any other creditor to secure the payment of his demands, by attachment or by levy upon the property of the corporation, although he may be personally liable by statute to satisfy other judgments against the corporation. An action was maintained against a corporation on a bond securing a certain sum to the plaintiff, a member of the corporation, the member being deemed by the court a stranger. Peirce v. Partridge, 3 Metc. (Mass.) 44; so of notes and bonds, accounts, and rights to dividends. Hill v. Manchester & Salford Waterworks, 5 Adol. & Ellis, 866; Dunston v. Imperial Glass Company, 3 B. & Adol. 125; Geer v. School District, 6 Vt. 76; Sawyer v. Methodist Episcopal Society, 18 Vt. 405; Rogers v. Danby Universalist Society, 19 Vt. 187."

pay the tax, unless compelled by law to do so, and that they were determined to rely upon the constitutional and legal rights of the bank under its charter. Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty, than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency. It was a mistake, it is true, of what their duty required from them, according to their own sense of it, but, being a duty by their own confession, their refusal was an act outside of the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchises of the bank. A sense of duty and conduct contrary to it is not "an error of judgment merely," and cannot be so called in any case. It amounted to an illegal application of the profits due to the stockholders of the bank, into which a court of equity will inquire to prevent its being made.

Thinking, as we do, that the action of the board of directors was not "an error of judgment merely," but a breach of duty, it is our opinion that they were properly made parties to the bill, and that the jurisdiction of a court of equity reaches such a case to give such a remedy as its circumstances may require. This conclusion makes it unnecessary for us to notice further the point made by the counsel that the suit should have been brought in the name of the corporation, in support of which they cited the case of Osborn v. Bank of United States [9 Wheat. 738, 6 L. Ed. 204]. The obvious difference between this case and that is, that the Bank of the United States brought a bill in the circuit court of the United States for the district of Ohio, to resist a tax assessed under an act of that State, and executed by its auditor, and here the directors of the Commercial Bank of Cleveland, by refusing to do what they declared it to be their duty to do, have forced one of its corporators, in self-defence, to sue. If the directors had done so in a State court of Ohio, and put their case upon the unconstitutionality of the tax act, because it impaired the obligation of a contract, and had the decision been against such claim, the judgment of the State court could have been re-examined, in that particular, in the Supreme Court of the United States, under the same authority or jurisdiction by which it reversed the judgment of the supreme court of Ohio on the case of Piqua Branch of State Bank of Ohio v. Jacob Knoop Treasurer of Miami County, 16 How. 369, 14 L. Ed. 977. * * *

We affirm the decree of the circuit court, and direct a mandate accordingly.

Mr. Justice CATRON, Mr. Justice DANIEL and Mr. Justice CAMPBELL dissented.[44]

[44] The decision of point 2, omitted here, should be read, if possible, in connection with the case of Hawes v. Oakland, post, p. 548.

FOSS v. HARBOTTLE.

(High Court of Chancery, 1843. 2 Hare, 461.)

VICE CHANCELLOR [WIGRAM].[45] The relief which the bill in this case seeks, as against the defendants who have demurred, is founded on several alleged grounds of complaint; of these it is only necessary that I should mention two, for the consideration of those two grounds involves the principle upon which I think all the demurrers must be determined. One ground is that the directors of the Victoria Park Company, the defendants Harbottle, Adshead, Byrom, and Bealey, have, in their character of directors, purchased their own lands of themselves for the use of the company, and have paid for them, or, rather, taken to themselves out of the moneys of the company a price exceeding the value of such lands; the other ground is that the defendants have raised money in a manner not authorized by their powers under their act of incorporation; and, especially, that they have mortgaged or encumbered the lands and property of the company, and applied the moneys thereby raised in effect, though circuitously, to pay the price of the land which they had so bought of themselves.

I do not now express any opinion upon the question, whether, leaving out of view the special form in which the plaintiffs have proceeded in the suit, the bill alleges a case in which a court of equity would say that the transactions in question are to be opened or dealt with in the manner which this bill seeks that they should be; but I certainly would not be understood by anything I said during the argument to do otherwise than express my cordial concurrence in the doctrine laid down in the case of Hichens v. Congreve, 4 Russ. 562, and other cases of that class. I take those cases to be in accordance with the principles of this Court, and to be founded on justice and common sense. Whether particular cases fall within the principle of Hichens v. Congreve is another question. * * * For the present purpose, I shall assume that a case is stated, entitling the company, as matters now stand, to complain of the transactions mentioned in the bill.

The Victoria Park Company is an incorporated body, and the conduct with which the defendants are charged in this suit is an injury not to the plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. And from the case of the Attorney-General v. Wilson Cr. & Ph. 1, without going further, it may be stated as undoubted law, that a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. This bill, however, differs from that in the Attorney-General v. Wilson in this,—that instead of

[45] The statement of facts is omitted. Part only of the opinion is given.

the corporation being formally represented as plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of,—the plaintiffs assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself.

It was not, nor could it successfully be argued, that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be, whether the facts alleged in this case justify a departure from the rule which prima facie would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative.

The demurrers are,—first, of three of the directors of the company, who are also alleged to have sold lands to the corporation under the circumstances charged; secondly, of Bealey, also a director, alleged to have made himself amenable to the jurisdiction of the Court to remedy the alleged injuries, though he was not a seller of land; thirdly, of Denison, a seller of land, in like manner alleged to be implicated in the frauds charged, though he was not a director; fourthly, of Mr. Bunting, the solicitor, and Mr. Lane, the architect of the company. These gentlemen are neither directors nor sellers of land, but all the frauds are alleged to have been committed with their privity, and they also are in this manner sought to be implicated in them. The most convenient course will be, to consider the demurrer of the three against whom the strongest case is stated; and the consideration of that case will apply to the whole.

The first objection taken in the argument for the defendants was, that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion, to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on the part of the defendants. I think there are cases in which a suit might properly be so framed. Corporations like this, of a private nature, are in truth little more than private partnerships; and in cases which may easily be suggested, it would be too much to hold, that a society of private persons associated together in undertakings, which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights, inter se, because, in order to make their common objects more attainable, the Crown or the legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights

to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in Wallworth v. Holt (4 Myl. & Cr. 635; see also 17 Ves. 320, per Lord Eldon), and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

But, on the other hand, it must not be without reasons of a very urgent character that established rules of law and practice are to be departed from,—rules, which, though in a sense technical, are founded on general principles of justice and convenience; and the question is, whether a case is stated in this bill, entitling the plaintiffs to sue in their private characters. [His Honor stated the substance of the act, sections 1, 38, 39, 43, 46, 47, 48, 49, 67, 70, 114, and 129.] The result of these clauses is, that the directors are made the governing body, subject to the superior control of the proprietors assembled in general meetings; and, as I understand the act, the proprietors so assembled have power, due notice being given of the purposes of the meeting, to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they may have originated. There may possibly be some exceptions to this proposition but such is the general effect of the provisions of the statute.

Now, that my opinion upon this case may be clearly understood, I will consider separately the two principal grounds of complaint to which I have adverted, with reference to a very marked distinction between them. The first ground of complaint is one which, though it might prima facie entitle the corporation to rescind the transactions complained of, does not absolutely and of necessity fall under the description of a void transaction. The corporation might elect to adopt those transactions, and hold the directors bound by them. In other words, the transactions admit of confirmation at the option of the corporation. The second ground of complaint may stand in a different position; I allude to the mortgaging in a manner not authorized by the powers of the act. This, being beyond the powers of the corporation, may admit of no confirmation whilst any one dissenting voice is raised against it. This distinction is found in the case of Preston v. Grand Collier Dock Company, 11 Sim. 327; s. c. 2 Railway Cases, 335.

On the first point, it is only necessary to refer to the clauses of the act to show, that, whilst the supreme governing body, the proprietors at a special general meeting assembled, retain the power of exercising the functions conferred upon them by the act of incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the plaintiffs on the present record. This in effect purports to be a suit by cestui que trusts, complaining of a fraud committed or alleged to have been committed by persons in

a fiduciary character. The complaint is, that those trustees have sold lands to themselves, ostensibly for the benefit of the cestui que trusts. The proposition I have advanced is, that although the act should prove to be voidable, the cestui que trusts may elect to confirm it. Now, who are the cestui que trusts in this case? The corporation, in a sense, is undoubtedly the cestui que trust; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound.

How then can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the Court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to show that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained, it must be shown either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion; this latter point is nowhere suggested in the bill: there is no suggestion that an attempt has been made by any proprietor to set the body of proprietors in motion, or to procure a meeting to be convened for the purpose of revoking the acts complained of. The question then is, whether this bill is so framed as of necessity to exclude the supposition that the supreme body of proprietors is now in a condition to confirm the transactions in question; or, if those transactions are to be impeached in a court of justice, whether the proprietors have not power to set the corporation in motion for the purpose of vindicating its own rights.[46] * * *

The second point, which relates to the charges and incumbrances alleged to have been illegally made on the property of the company, is open to the reasoning which I have applied to the first point, up-

[46] It was held that, upon the facts stated, the continued existence of a board of directors de facto must be presumed, and that the possibility of calling a meeting of shareholders capable of ratifying the transactions questioned, or compelling the bringing of action in the name of the corporation, was not excluded by the allegations of the bill.

on the question whether, in the present case, individual members are at liberty to complain in the form adopted by this bill; for why should this anomalous form of suit be resorted to if the powers of the corporation may be called into exercise? But this part of the case is a greater difficulty upon the merits. I follow with entire assent, the opinion expressed by the Vice-Chancellor in Preston v. The Grand Collier Dock Company, that, if a transaction be void, and not merely voidable, the corporation cannot confirm it, so as to bind a dissenting minority of its members. But that will not dispose of this question. The case made with regard to these mortgages or incumbrances is, that they were executed in violation of the provisions of the act. The mortgagees are not defendants to the bill, nor does the bill seek to avoid the security itself, if it could be avoided, on which I give no opinion. The bill prays inquiries with a view to proceedings being taken aliunde to set aside these transactions against the mortgagees. The object of this bill against the defendants is to make them individually and personally responsible to the extent of the injury alleged to have been received by the corporation, from the making of the mortgages. Whatever the case might be, if the object of the suit was to rescind these transactions, and the allegations in the bill showed that justice could not be done to the shareholders without allowing two to sue on behalf of themselves and others, very different considerations arise in a case like the present, in which the consequences only of the alleged illegal acts are sought to be visited personally upon the directors. The money forming the consideration for the mortgages was received, and was expended in, or partly in, the transactions which are the subject of the first ground of complaint.

Upon this, one question appears to me to be, whether the company could confirm the former transactions, take the benefit of the money that has been raised, and yet, as against the directors personally, complain of the acts which they have done, by means whereof the company obtains that benefit which I suppose to have been admitted and adopted by such confirmation. I think it would not be open to tthe company to do this; and my opinion already expressed on the first point is, that the transactions which constitute the first ground of complaint may possibly be beneficial to the company, and may be so regarded by the proprietors, and admit of confirmation. I am of opinion that this question,—the question of confirmation or avoidance,—cannot properly be litigated upon this record, regard being had to the existing state and powers of the corporation, and that therefore that part of the bill which seeks to visit the directors personally with the consequences of the impeached mortgages and charges, the benefit of which the company enjoys, is in the same predicament as that which relates to the other subjects of complaint.

Both questions stand on the same ground, and, for the reasons which I stated in considering the former point, these demurrers must be allowed.[47]

KESSLER & CO. v. ENSLEY CO. et al.

(Circuit Court of the United States, 1903. 123 Fed. 546.)

This is a bill by minority stockholders of the Ensley Land Company, brought in behalf of the corporation, which refused to sue, to set aside certain transactions between the company and the defendants, Ensley Company et al., who, it is alleged, while occupying fiduciary relations, defrauded the corporation in the sale of 240 acres of land, of which defendants became purchasers.[48]

JONES, District Judge.[49] * * * Equity permits a stockholder to maintain a bill to enforce the rights of his corporation, solely to prevent a failure of justice. "The circumstances of each case determine the jurisdiction to give the relief sought." Dodge v. Woolsey, 18 How. 344, 15 L. Ed. 401. To entitle the stockholder to relief, it is not enough that the governing body has refused to act, or that the refusal evinces mistaken judgment. The stockholder who seeks redress as to any corporate act which the charter permits the corporation to perform must show either that the governing body is so disorganized that it cannot act; or that it is interested adversely to the corporation, or under the dominion of those who are; or will be required to disapprove its own breaches of trust, as distinguished from mistakes or errors of judgment; or that its refusal will endanger the rights and franchises of the corporation, or result in irreparable loss and injury; or that its attitude, under the situation presented by the bill, discloses negligence or indifference to the interest of the corporation, in such degree as amounts to the practical equivalent of bad faith; or else bring forward other pertinent facts which challenge and impeach the fitness of the governing body to properly decide the question at issue. Even then, if the case will admit of delay, the complaining stockholder must appeal from the decision of the directors to the body of the stockholders at large, and the facts averred in the bill must plainly put them in the wrong, before the court will feel authorized to entertain the complaint of the stockholder. Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Corbus v. Gold Mining Co., 187 U. S. 458, 23 Sup. Ct. 157, 47 L. Ed. 256; Tuscaloosa Manufacturing Company v. Cox, 68 Ala. 71.

It not being charged in this case that either of the two boards, or the body of the stockholders, who declined to bring or authorize

[47] Accord: Horst v. Traudt, 43 Colo. 445, 96 Pac. 259 (1908).

[48] Statement of facts substituted.

[49] Part only of the opinion is given.

the bringing of this suit, were themselves guilty participants in any of the frauds complained of, or in any wise interested adversely to the corporation, or under the dominion or control of those who were instrumental in bringing about the sales sought to be avoided, or that they acted otherwise than in the exercise of honest judgment as to the interest of the Land Company, their decision not to litigate is binding upon the court, unless that refusal will result in enforcing some ultra vires or illegal act of the corporation, or evinces such recklessness and indifference to the rights of the corporation as amounts to bad faith or fraud, or will needlessly work the practical destruction of the corporate enterprise. To properly determine these questions the court must look to the status and condition of affairs as they reasonably appeared to the stockholders, under the facts set forth in the bill, at the time of entering into the transactions now sought to be set aside, and then weigh their decision not to disturb them in the light of existing conditions at the time that decision was made.[50] * * *

Making due allowance for the charges on "information and belief," and for facts so stated as to amount to no more than the opinion of the pleader, the bill charges actual fraud of a grave nature, not merely constructive fraud, upon all the defendants except Barker. On the facts stated, a court of equity would unquestionably have set aside the sale on seasonable application. Nevertheless, under decisions which are controlling here, the transactions complained of were not void as to the corporation, but merely voidable. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Thomas v. Brownville R. Co., 109 U. S. 524, 3 Sup. Ct. 315, 27 L. Ed. 1018. The title conveyed by the proceedings complained of was not bad until the Land Company made it good, but remained good until it was made bad. It was a defeasible title which would ripen into a good title if not seasonably avoided. The conveyances were not ultra vires the corporation. The Land Company was formed for the purpose of selling this very land, and the sales were made in the exercise of the corporate power of providing for the debts of the company.

The power must reside somewhere in every corporation, when it has been defrauded, whether by its own officers or third prsons, to determine what course it will pursue with reference to the fraud. The fact that the corporation has been defrauded does not strip it of power to elect to stand upon the transaction as made. Every wronged person, who is sui juris, has that right against the wrongdoer. If the corporate tribunal exercises its judgment upon the question honestly, and is not adversely interested, or under the control of other influences which sway it from a fair and impartial judgment, from the

[50] The court found that, under the facts stated, the decision of the majority not to bring suit was not open, in the absence of any charge of improper motive on their part, "to reasonable condemnation, as evincing such negligence or criminal indifference to the interest of the corporation as amounts to bad faith, fraud, or oppression of the minority."

standpoint of the interest of the corporation itself, a decision not to disturb the fraud, unless it evinces such recklessness and negligence as amounts to bad faith, is not a fraud upon the objecting stockholders, though it results in a refusal to redress a fraud upon the corporation. The duty which the corporation, or its governing body, owes its stockholders in such cases, is to fairly and impartially consider the question of redressing the wrong, and not to commit a corporate fraud upon its stockholders by refusing to set aside the fraud upon the corporation from selfish interest or other bad motives, or from such negligence and indifference as is equivalent to bad faith, and amounts to a clear breach of trust, as distinguished from mere bad judgment.

Complainants cite Mason v. Harris, L. R. 11 Chan. Div. 97, in support of their contention that the grievances complained of were either incapable of ratification, or that the refusal to redress them, under the circumstances here disclosed, amounts to a fraud upon the minority. They quote the following paragraph from the opinion in that case:

"Whenever a fraud is committed by persons who command the majority vote, the minority can sue. The reason is plain, as, unless such suit were allowed, it would put it in the power of the majority to defraud the minority with impunity. If the majority were to make a fraudulent sale and put the money in their own pockets, would it be reasonable to say that the majority could affirm the sale?"

The court was there speaking of the injustice of compelling a stockholder to abide the judgment of those who were interested in upholding the fraud. It was referring to the fitness of the governing body at the time the individual stockholder seeks redress. Although the defendants here had "command of the majority vote" at the time of the grievance complained of, by reason of the deceit charged in the bill, whereby the majority was overreached and deceived, just as the complaining stockholders charge they were, the fact that the majority had been thus deceived into voting for the proposition does not disqualify it from passing on the matter when discovery is made. It is not to be driven from the judgment seat merely because it has been the victim of fraud. It must be shown to have some adverse interest, or to be under ulterior influences which prevent it from fairly determining what is to the best interest of the corporation, under all the circumstances, in view of the nature and result of the fraud practiced upon it. To bring this case within the rule of Mason's Case, supra, the defendants must "command the majority vote" at the time redress is sought.

Other cases cited in behalf of complainants on this point relate either to ultra vires or illegal acts of the corporation, as where the governing body to which application for redress must be made has itself either defrauded the corporation, or is under the control of those who overreached it, or is otherwise shown to be an unfit tribunal to de-

termine the policy of the corporation; or, where the act complained of not only affects the rights of the corporation against the person sought to be sued, but also involves some wrong by the corporation to separate and individual rights of the stockholders against their corporation. The principle which forbids the majority of the corporation to profit at the expense of the minority, by condoning a fraud against their corporation, is wholesome, and not in any wise questioned. We have no such case here. The great body of the stockholders who agreed to the transactions complained of in the first instance, and afterwards refused to set them aside, are shown to have been ignorant of the fraud at the time it was committed, and are not shown then, or at any subsequent period, to have been influenced by any interest adverse to the corporation, or by any motive which unfits them to pass upon the matter. Their vote refusing to disturb the transaction could not put any fruits of the wrong in their pockets. They gained nothing which the minority lost. They applied the identical measure of justice to themselves and the dissenting stockholders. As they constituted almost the entire body of stockholders, almost the entire burden of any loss entailed by their decision would fall upon them. On the face of the bill, there was unselfish determination.

The recovery sought by this bill is for the benefit of the corporation. The bill is filed solely in right of the corporation, and does not seek to enforce any separate or individual right of the stockholders. The corporation is only a nominal defendant. It is the real plaintiff. It is clear upon principle, in such a case, that the stockholders cannot maintain the suit, if the corporation itself is not in position to do so. It is an elementary principle of law that one claiming through and in subordination to a party estopped is himself estopped. The cases which permit a recovery in behalf of the corporation, in avoidance of transactions which it is estopped to rescind, because it has consummated them and retained the benefit, are those in which the corporation has entered into some ultra vires or illegal transaction, done something involving infraction of some direct right of the shareholder against the corporation—as where, without the authority of law, it subordinates the exercise of its corporate powers and control of its property to the dominion of a rival, or embarks in enterprises not authorized by the charter, or takes some action impairing the rights of the stockholders as among themselves, as by unlawfully issuing preferred stock, and the like. In such cases the illegal transaction is a distinct wrong of the corporation, against the rights of the stockholders separately and individually. It gives each stockholder a right to restrain its action and to compel it to retrace its steps. In such cases, justice can generally be done only by returning the corporation to its original status, and restoring the stockholder's rightful legal status towards it, by ripping up the whole transaction, although the corporation itself, as such, may be estopped to complain. The stockholders in this case are seeking to enforce no such right. They demand the en-

forcement of a right which belongs to the corporation solely, as such. The sales complained of are not ultra vires the corporation, and were not forbidden by statute. The grievances relate to transactions wholly intra vires. The corporation has deliberately refused to disturb them. This solemn corporate decision puts an end to any right of the dissenting stockholder to disaffirm or to compel the corporation to avoid the transaction.

An analysis of the premises of the argument in support of the contrary conclusion shows that it is unsound. The transactions here complained of not being void, but merely voidable, who can avoid them? Certainly, only the parties to the transaction, no rights of creditors being involved. There are only two parties—the corporation and the fraudulent grantees. The latter cannot set up their own misconduct to avoid the transaction. The former can act only by its governing body or by the stockholders collectively. There is but one subject-matter, and that is the sale and purchase of the land. The transactions must either be good as to the Land Company or bad as to the Land Company. They must either be avoided in toto or must stand in toto. If one stockholder, acting for himself, can affirm, another, acting for himself, can disaffirm. There is but one thing to affirm, and it must either be binding upon all the stockholders or not binding on any of them. The power to affirm or to disaffirm in a case of this kind is not an individual prerogative, but the right and power of the whole body of stockholders collectively. This collective body must act and decide according to the vote of the majority. "The rule is that the majority governs, and every stockholder contracts that such shall be the rule." Morawetz on Corporations, § 474. When, therefore, the majority, in such a case as this, refuses to disaffirm, all right of the majority to disaffirm is gone. There can be but one disaffirmance, and that must be the disaffirmance of the governing body of the corporation. A majority of the stockholders, in a case of this kind, represent the ultimate corporate sovereignty, within the limits of its charter, and can bind the minority by its refusal to disaffirm as to a matter intra vires. The only remedy of the minority is to appeal to a court of equity to enforce the rights of the corporation, if the majority has acted fraudulently, or in bad faith to the minority, in refusing to redress a fraud upon the corporation. Foss v. Harbottle, 2 Hare, 461; Urner v. Sollenberger, 89 Md. 316, 43 Atl. 810. That charge is not made here. * * *

The demurrers are sustained, and the cost decreed against complainants. If the complainants desire to amend, they may apply for leave under the thirty-fifth rule in equity within 40 days. If amendment is not allowed within that time, final decree will then be rendered dismissing the bill as to all the defendants, but without prejudice to the right of the Ensley Land Company or complainants to maintain such actions at law as they may be advised. The Land Company is a nominal defendant, and has not demurred, but answered.

It is, however, the real complainant. If its answer could be looked to, it gives no support to the equity of the bill. It would be an idle ceremony to proceed with the case between it and the complainants, since the ruling on demurrer establishes there can be no decree in its favor, and no relief is sought against it.[51]

ATWOOL v. MERRYWEATHER.

(Court of Chancery, 1868. L. R. 5 Eq. Cas. 464, note).

This was a bill by the plaintiff, on behalf of himself and all other the shareholders in the East Pant Du United Lead Mining Company, Limited, except the persons who were defendants thereto, against Samuel Merryweather, Henry Whitworth, and the East Pant Du Company, Limited, for the purpose of setting aside a contract for the sale and purchase of certain mines (for the purpose of purchasing and working which the company was formed), and compelling repayment from Merryweather and Whitworth of the sum of £3940., or such portions as had been received by them, and a return of the 600 shares allotted to Merryweather.

The bill stated the incorporation, in 1863, of the company under the promotion of defendants Merryweather and Whitworth, who published a prospectus stating that the company was formed "for the purpose of purchasing and working the extensive and valuable mining sets known as the East Pant Du & Colomendy Lead Mines," and containing very favourable representations of the value of the mines, for the purchase of which the company was stated to have arranged for £7000.—£4000. to be paid in cash, and £3000. in shares of the company.

The capital was fixed at £30,000., divided into 6000 shares of £5. each; but only 2000 shares had been taken altogether, on which £3940. had been received. This money was paid to Merryweather, and 600 shares were registered in his name as paid up, in part payment of the £7000, the alleged price of the mines.

Upon inquiries, the following circumstances were discovered in reference to the formation of the company: Merryweather applied to Whitworth to assist him in disposing of the mines in question, which he held under an agreement for a lease for twenty-one years, and had then discovered to be of no value. Merryweather proposed to dispose of his interest for £4000., and the scheme concocted between himself and Whitworth was, that a company should be formed for the purpose of purchasing and working the mines, which were to be sold to such company for £7000.

[51] For later stages of the same litigation, see same title, 129 Fed. 397 (1904); 141 Fed. 130 (1905); 148 Fed. 1019, 79 C. C. A. 534 (1906).

Of this money Merryweather was to get £4000., while the remaining £3000. was to be paid to Whitworth for his assistance in getting up the company. This agreement was concealed from the other directors, who were induced to believe that £7000. was bona fide to be paid as the purchase-money.

A committee appointed at a meeting of the 1st of June, 1864, recommended by their report that the undertaking should be abandoned, steps taken to relieve the company from any liability on the contract, and to recover back the money already paid by the shareholders.

At an extraordinary general meeting held on the 16th of June, 1864, a resolution was passed for receiving the report by a majority of the shareholders, and on the 30th of June, 1864, a bill was filed in the name of the company, alleging that the contract for the purchase of the mine had been fraudulently obtained by the defendant Merryweather, and was void, and that he was not entitled to the 600 shares allotted to him in respect of it, and praying that the purchase of the mine might be set aside, and the money paid returned to the shareholders who had advanced it.

On the 6th of July Merryweather and Whitworth caused notices to be issued for a meeting of the board of directors "to consider the course to be taken in reference to the chancery proceedings which have been instituted in the name of the company." At the meeting held on the 9th of July Merryweather, Whitworth, and Ashworth (the three out of the six directors present at the meeting) passed a resolution that proceedings should be taken to get the bill taken off the file.

On the 1st of August, 1864, the Court was moved to take the bill off the file, but the motion was ordered to stand over until the next term in order to give an opportunity to call a general meeting of the shareholders of the company to take the matter into consideration. A meeting was accordingly held on the 12th of October, "for the purpose of taking the said bill into consideration, and adopting such resolutions in reference thereto as the meeting may determine upon."

A resolution was proposed for adopting and continuing the chancery proceedings, whereupon an amendment was proposed by Whitworth for referring all matters in difference between the shareholders and Merryweather to arbitration, and for staying all legal proceedings. This amendment was lost by 11 votes to 4 upon a show of hands, and the original resolution was carried by 10 to 4. A poll having been demanded upon the amendment, proxies were produced, and 14 persons, holding altogether 1070 shares and 324 votes, voted against the amendment, and 12 persons, holding 1490 shares and having 344 votes, voted for the amendment. But excluding the votes of the defendants Merryweather and Whitworth, there was a majority of 86 votes against the amendment, and excluding only the votes of Merryweather there was a majority against it of 58 votes." The motion to take the bill off the file was renewed, and on the 5th of December, 1864, the Vice

Chancellor Sir W. P. Wood directed the bill to be taken off the file, but made no order as to the costs of the motion. See 2 H. & M. 254.

The present bill, which was filed on the 14th of December, 1864, by a holder of 100 shares in the company (purchased on the faith of the statements contained in the prospectus), suing on behalf of himself and all other the shareholders in the East Pant Du Company, except the defendants, against Merryweather, Whitworth, and the company as defendants, alleged that none of the shareholders in the company other than the defendants were desirous that the contract with Merryweather should be carried into effect, or that the relief prayed should not be granted; that the defendants had altogether 106 votes as shareholders in the company, and obtained the proxies of the other shareholders who voted for the amendment by entering into engagements to indemnify them against loss; "and such votes, together with the aforesaid 106 votes of the said defendants, constitute a majority of the shareholders' votes in the company."

The bill also alleged, that even without such proxies the 106 votes held by the defendants made it impossible to obtain a fair decision at a general meeting.

The bill further charged, that the contract was obtained by misrepresentations as to the value, with full knowledge by the defendants that the mines were worthless, that £4000. was an exorbitant price for them, and that no other portion of the £7000. was ever intended to be treated as purchase-money of the mines, but was intended to be paid to Whitworth, the defendants having become promoters of the company solely for the purpose of raising the £7000. for their own private benefit; that these facts were fraudulently concealed from the other directors and shareholders, and that if they had been disclosed the company never would have contracted to purchase the mines. The bill prayed that the contract for the purchase of the mine might be set aside, and a return of the money and shares received by Whitworth and Merryweather; and an injunction to restrain any proceeding to recover the balance of the purchase-money; compensation for all damage and loss occasioned to the company, and, if necessary, that the company might be dissolved and wound up under the direction of the Court.

Sir W. PAGE WOOD, V. C. I think that, upon principle, a contract of this kind cannot stand, and that there is not such a defect in the constitution of the suit as would be fatal according to the authority of Foss v. Harbottle, 2 Hare, 461.

Looking at the facts as they come out, I am clearly of opinion that this arrangement, by which Merryweather was to have £4000. and Whitworth £3000., was concealed from everybody, and that Merryweather assisted in that concealment by allowing his name to appear as the sole vendor, and taking the purchase-money.

Upon such a transaction the Court will hold that the whole contract is a complete fraud. I do not in the least say that where persons with

their eyes open know that the agent who secures them the bargain is going to take money for it, that would not be all right enough. If the company knew this gentleman was to have this amount as promotion-money, well and good. There might have been some difficulty, Mr. Whitworth being a director, if it had been a sale by Merryweather and Whitworth eo nomine, both of them together. If that had been the case more might have been said about the frame of the suit. But here it is a simple fraud, and nothing else. Merryweather knowing Whitworth's position with regard to the company, and that as an honest man Whitworth was bound to tell the company what price he bought the mines for, agreed that the mine should be sold to the company for £7000., and that the real price, £4000., should not be disclosed to the company.

With regard to the frame of the suit, a question of some nicety arises how far such relief can be given at the instance of a shareholder on behalf of himself and other shareholders on the ground that the transaction might be confirmed by the whole body if they thought fit, and that the case would fall within Foss v. Harbottle, according to which the suit must be by the whole company. On the previous occasion, when it was desired to take proceedings to set aside this transaction, a gentleman took upon himself to file a bill in the name of the company. A motion was made to take that bill off the file, as the person filing the bill was not the solicitor of the company, and was not authorized to file the bill, and I ordered the bill to be taken off the file. There was a majority against setting aside this transaction. The number of votes for rescinding the transaction was 324, and 344 the other way. But Merryweather, in respect of the shares obtained by this sale, which I have held cannot stand, had 78 votes, and Whitworth 28, making altogether 106 out of the 344. If I were to hold that no bill could be filed by shareholders to get rid of the transaction on the ground of the doctrine of Foss v. Harbottle, it would be simply impossible to set aside a fraud committed by a director under such circumstances, as the director obtaining so many shares by fraud would always be able to outvote everybody else. I held on a former occasion, and I adhere to that decision, that the Court must first be satisfied that the plaintiffs were authorized to call themselves the company, the solicitor who put the bill upon the file having no retainer under the corporate seal.

This bill being filed by the plaintiff on behalf of himself and the other shareholders, it is suggested that the proper course would be to file a bill on behalf of himself and the other shareholders for leave to use the name of the company, in order to set aside that contract. I do not think that circuitous course is necessary under any circumstances. It is quite clear that it is not necessary here, because in this case the purchase of the mines is the only thing for which this company was incorporated. It appears to me that it would not be competent for a majority of the shareholders against a minority to say that they in-

sist upon a matter of that kind where the whole inception of the company is simply a motion by a fraudulent agent, qua director, to confirm a purchase as made for £7000., which was made for £4000. The whole thing was obtained by fraud, and the persons who may possibly form a majority of the shareholders, could not in any way sanction a transaction of that kind.

I think in this particular case it is hardly necessary to rely upon that, because, having it plainly before me that I have a majority of the shareholders, independent of those implicated in the fraud, supporting the bill, it would be idle to go through the circuitous course of saying that leave must be obtained to file a bill for the company, and pro forma have a totally different litigation. The only course now to take is to set aside the contract for sale and purchase of the mines, and cancel the agreement for such sale. The purchase-money must be repaid with interest, and the share certificates given to Merryweather, delivered up. The profits made by the company to be set off, and the company to have a lien for the balance. I shall also declare that the company ought to be wound up.

DUNPHY v. TRAVELERS' NEWSPAPER ASS'N.

(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 495, 16 N. E. 426.)

KNOWLTON, J. The plaintiff brings this bill in equity, filed on December 18, 1886, as a stockholder in the defendant corporation, in behalf of himself and such other stockholders as may join him therein, alleging that Roland Worthington, one of the defendants, is the president and treasurer of said corporation, and is, and for a long time has been, the owner or controller of a majority of the shares of its capital stock, and, by means of his ownership and control, has chosen such persons to be directors as he has seen fit, and has improperly used and invested large sums of the money of the corporation in certain specified ways, and has kept other large sums of its money on hand, drawing no interest; and has improperly received large amounts as his salary as president of the corporation, and as rent for a building owned by him and occupied by it; and has prevented the making of dividends upon the capital stock, and has otherwise improperly managed the affairs of said corporation, to the great damage of the plaintiff and other stockholders. The plaintiff prays that said Worthington may be directed to render accounts of all his dealings with the assets of the corporation; and to refund all moneys improperly received or paid out by him, and to pay to certain stockholders such sums of money as shall equalize among all the stockholders certain distributions alleged to have been irregularly made among some of them; and to file a correct statement in detail of all the present assets and liabilities of the corporation; and hereafter annually to render accounts of his deal-

ings with it as treasurer, so long as he holds that office. He also prays that all funds of the corporation on hand in excess of $5,000 be ordered distributed among the stockholders at once, and that the corporation be required hereafter to declare dividends as often as the cash on hand shall equal 5 per cent. of the amount of its capital stock, and for general relief.

Courts of equity are swift to protect helpless minorities of stockholders of corporations from the oppression and fraud of majorities. But the legal relations into which the members of a corporation enter require them to seek redress of supposed wrongs done them as stockholders from its officers, and from the corporation itself, before applying elsewhere. Misconduct in dealing with a corporation, or in the management of its affairs, can affect its members only through the corporation itself. The wrong, in such a case, is done primarily to the corporation. It is the duty of its directors, or other managing officers, to protect it from those who would do it injustice, and to seek compensation for any injury which it receives. Stockholders in a corporation impliedly agree, when they join it, to act in the corporate business through officers chosen to represent them, or by vote at meetings of the members regularly called; and so, if they deem themselves aggrieved as shareholders by the dealings of others with it, or by the acts of its managers, they are bound to seek their remedy through corporate channels—First, by application to the officers in charge; and, failing there, secondly, to the corporation itself, at a meeting of its members. If they can obtain justice at the hand of neither, the courts are open for their relief.

It would be contrary to the fundamental principles of corporate organization to hold that a single shareholder can at any time launch the corporation into litigation to obtain from another what he deems to be due to it, or to prevent methods of management which he thinks unwise. Intelligent and honest men differ upon questions of business policy. It is not always best to insist upon all one's rights; and a corporation, acting by its directors or by vote of its members, may properly refuse to bring a suit which one of its stockholders believes should be prosecuted. In such a case the will of the majority must control. It is only when the action of a corporation in refusing to proceed at the request of a stockholder is fraudulent as against him, or in disregard of his rights, that he can maintain a suit in his own name in the corporate right. The court cannot interfere with the management of corporations in matters which are properly within their discretion, so long as their discretion is fairly exercised; and it is always assumed, until the contrary appears, that they and their officers obey the law, and act in good faith towards all their members. Even when their acts are ultra vires, or otherwise illegal, a complaining member must first seek his remedy within the corporation. The only exception to the rule that a stockholder must apply to the directors, and also, if need be, to the corporation for redress of a wrong done it, before he can sue

in a court of equity for himself, and in behalf of other stockholders, is when it appears that such application would be unavailing to protect his rights. Brewer v. Theatre, 104 Mass. 378; Allen v. Wilson (C. C.) 28 Fed. 677; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Detroit v. Dean, 106 U. S. 537, 1 Sup. Ct. 500, 27 L. Ed. 300; Dimpfel v. Railway Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121; Foss v. Harbottle, 2 Hare, 461. That may happen when the directors themselves are the wrong-doers, or are in fraudulent combination with them, or when the corporation is controlled by them, or when it is necessary that action should be taken too speedily to leave time for a corporate meeting of stockholders.

In the case at bar there is an averment that Roland Worthington, the alleged wrong-doer, has for a long time controlled a majority of the stock, and has elected such persons directors as he chose. That states a sufficient reason for not applying to the corporation at a meeting of its members for action to redress its wrongs. But it is not alleged that the plaintiff ever attempted to move the directors, in the interest of the corporation, in the matters complained of, or that any good reason existed for his failure so to do. It does not even appear who, or how many, the directors are. It is said that the defendants Roland Worthington and Roland Worthington the younger, are directors, but no others are named. The law provides that there shall be at least three, and it is to be presumed that there are others besides these defendants. Rev. St. c. 38, § 3; Pub. St. c. 106, § 25. There is no allegation of fraud, or of wrongful combination with Roland Worthington, or of other misconduct on the part of any of them; and it cannot be presumed, in the absence of such averments, that they would refuse to do their duty if their attention were called to it.

In Brewer v. Theatre, ubi supra,—a much stronger case for the plaintiff than this,—an allegation was in these words: "A majority of the present board of directors of said defendant corporation are acting in the interest of, and are under the control of, said Tompkins and Thayer," the authors of the alleged fraud, and it was held that this allegation did not set forth a sufficient reason for bringing a suit without first requesting the directors to do it.

For the reasons which we have stated the demurrer must be sustained, but, inasmuch as the bill may be amended, it may be well to consider some other objections made by the defendants.[52] * * * Demurrer sustained.[53]

[52] The consideration of the other objections is omitted.

[53] See Corbus v. Alaska Treadwell Gold Mining Company, 187 U. S. 455, 23 Sup. Ct. 157, 47 L. Ed. 256 (1903).

DONNELLY v. SAMPSON.

(Supreme Court of Wisconsin, 1908. 135 Wis. 368, 115 N. W. 1089.)

Appeal from a judgment of the Circuit Court for Florence County; John Goodland, Circuit Judge. Affirmed.

Stockholder's action against the defendant corporation and its president to vindicate the corporation's right to certain real estate claimed to have been wrongfully diverted to the use of such president.

The following is the substance of the complaint, omitting formal allegations as regards the status of the plaintiff and of the defendant, such allegations being confessedly sufficient: Since prior to May 16, 1903, the corporation has been the owner of lands in Florence county, Wisconsin, described as follows: (The particular descriptions we omit.) It has not held any meetings either of stockholders or directors for many years, the entire business having been left wholly under the control of the defendant Sampson, its president. During such time such president has suffered the corporate real estate mentioned to be sold for taxes and suffered and procured deeds thereof to be issued to divers persons (naming the grantee as to each tract of land), with intent to procure the title under such tax deeds to be vested in himself and has procured conveyances from such persons accordingly. All of said tax deeds and conveyances from the grantees therein have been duly recorded. Said tax titles are clouds on the title of the corporation to said lands. Plaintiff has been unable with due diligence to induce the corporation to commence an action to right the wrong aforesaid. He applied to the secretary of the corporation, who owns a large amount of its capital stock, for information as to who are its officers and directors and was refused such information. The corporation has for several years failed to comply with the law as regards filing with the Secretary of State of the state of Wisconsin a statement as to its business and officers. Plaintiff cannot request the corporation to bring an action to remedy the wrong aforesaid without the president becoming informed of the danger of his being called to account in court for his misdeeds, in which case, plaintiff believes, he would before the court could act efficiently in the matter, place the tax titles beyond its reach. December 16, 1906, plaintiff requested the secretary to have this action brought in the name of the corporation, which was refused.

The defendants demurred to the complaint for insufficiency of facts to constitute a cause of action and for other reasons. The demurrer was overruled.

MARSHALL, J. (after stating the facts as above). This case is ruled by the familiar principle that in case of a wrong to a corporation, remediable only by judicial interference, and the persons possessing the primary right as its officers to move in that regard fail upon demand or request being made by a stockholder, or stockholders, to do

so or without such request or demand in case of the circumstances being such as to indicate that the same would be useless, any one or more of them may on behalf of all sue to protect the corporate rights, making the wrongdoer, or doers, and the corporation parties defendant. Doud v. Wisconsin, Pittsville & Superior Ry. Co., 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620; Cunningham v. Wechselberg, 105 Wis. 359, 81 N. W. 414; Egaard v. Dahlke, 109 Wis. 366, 85 N. W. 369; Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867; Kircher v. Pederson, 117 Wis. 68, 93 N. W. 813.

Whether any case fails within the principle stated or not must be determined by its own peculiar circumstances. In that regard there is no absolutely certain test. The trial court has considerable discretion in the matter. In case of its deciding that the situation is proper, within the principle stated for the exercise of its equity jurisdiction upon the ground that the facts alleged fairly satisfy the calls of the rule, the determination cannot properly be reversed upon appeal unless it clearly appears that such decision is wrong.

In this case it can not be well questioned but that a serious wrong to the corporation requiring judicial interference to remedy it is charged. The allegations to the effect that the president had full control of all the corporate affairs and suffered and procured its real estate to be sold for taxes and the tax titles based thereon through mesne conveyances to be vested in himself, amply shows, with or without that reasonable intendment which must be considered in favor of a pleading, that he needlessly and fraudulently allowed the taxes upon the lands to go unpaid, having in view a purpose of divesting the corporation of its land and acquiring the same for his personal use. The charge that for many years he has been permitted to so handle the corporate affairs in a purely personal way, sufficiently shows that he so dominated its affairs that a demand upon him, as its executive officer, or upon its board of directors, to institute an action to remedy the wrong complained of would not only be useless but, as alleged, would rather efficiently stimulate him to pass the wrongfully acquired titles on to some innocent party, or parties, and beyond the reach of the court.

On the whole, it is considered that the facts alleged fairly satisfy the test laid down in Northern Trust Co. v. Snyder, supra. In that case it was said in regard to the essential status of a stockholder to enable him to bring such an action as this: "In order that the situation in that regard may be complete to the satisfaction of equity, it is necessary to show that such persons (the corporate officers) will not perform their duty. * * * That may be done in either of two ways. By showing that they have neglected or refused to proceed after being requested so to do by some person or persons whose requests in that regard should be honored; or by showing, expressly or by necessary inference, that they are so concerned in the wrong to be redressed, and hostile to any vindication or attempt to vindicate the

corporate rights, that it is reasonably certain that a request to them to proceed to that end by judicial remedies would be unavailing. Observations may be found in some legal opinions tending to convey the idea that a demand upon the proper corporate officers to enforce a corporate right of action, and their refusal so to do, regardless of circumstances, is a condition precedent to the right of a member of a corporation to stand in their place and do their duty. Such is not the law. If it appears, reasonably, by all the allegations of the complaint, in a suit instituted by a member of a corporation in its right, that those persons in whom the duty and the primary right rests to represent it will not perform that duty, from any cause, a case is thereby presented, subject to proof, entitling an interested person, * * * to protect his right and that of all others similarly situated, by suing in his and their behalf, and presenting to a court for adjudication the cause of action of the corporation."

We have treated the case from the viewpoint most favorable to appellants, viz.: that the complaint does not state facts sufficient to show that any fair attempt was made to demand or request the corporation to commence an action to remedy the wrong complained of. Reliance is placed by appellants' counsel on Doud v. Wis., P. & S. R. Co., supra, but neither the decision there nor anything said in the opinion is necessarily controlling here. The trial court in that case refused to exercise its jurisdiction, holding that the facts alleged did not sufficiently excuse demand upon the corporation to commence judicial proceedings to protect its interest, and the decision was sustained on appeal. That does not make a judicial rule necessarily requiring, in just such a case, reversal of a trial court's decision sustaining the action. It may well be that under the facts the discretion of the court was broad enough to enable it to take or refuse jurisdiction free from appellate interference. It was there said, and counsel for appellants now point thereto with confidence: "It is insisted by plaintiff's counsel that the facts stated in the complaint show that the directors would have refused to proceed in the name of the corporation, or would, if they had so proceeded, have studied to make the suit fruitless of results. We cannot, however, make that inference from the matters in the complaint. It may well be that the president had such influence over the board of directors that he would control their action in the matter, but we cannot presume that this would be the case."

Here, as appears, the board of directors did not for many years pay any attention to the corporate affairs; that they left the president in full control of everything as if he were the only one interested and that the secretary, who was himself a large stockholder, had full knowledge of the president's misdeeds, was agreeable thereto and so hostile to stockholders circumstanced as plaintiff was that he suppressed from them knowledge of the names of other officers of the corporation. Under those circumstances it seems that the trial court had

reasonable ground at least to conclude that an efficient demand upon the corporation to appeal to the court against its president was impracticable, if not impossible.

By THE COURT. The judgment is affirmed.[54]

PELLIO v. BULLS HEAD COAL Co.

(Supreme Court of Pennsylvania, 1911. 231 Pa. 157, 80 Atl. 71.)

The following opinion was filed in the court below:

EDWARDS, P J.[55] * * * The defendants named in plaintiff's bill are the Bulls Head Coal Company, David J. Whiteford, Emma J. Dudley (formerly Emma J. Burr), and Emma J. Dudley, executrix of C. A. Burr, deceased—four defendants.

"The allegations of plaintiff's bill are, briefly, and in part, as follows:

"(1) The Bulls Head Coal Company was organized in 1901 with a capital stock of $25,000, the total number of shares issued amounting at par to $22,500, Burr owning $10,000, and Whiteford $9,000.

"(2) The defendant company immediately after its incorporation engaged in the mining and selling of coal. Burr was president, and Whiteford, secretary and treasurer.

"(3) Burr and Whiteford managed the company in a manner to suit themselves, paid such dividends as they pleased, drew large salaries, and otherwise misapplied the funds of the company. From about April, 1904, to July, 1906, the sum of $49,000 was paid in salaries to three of his defendants, viz., C. E. Burr, D. J. Whiteford, and Emma J. Dudley.

"(4) On July 31st there was in the treasury of the company the sum of $14,496.01. On August 17th of the same year plaintiff was induced to part with his stock.

"(5) In accordance with the decree of the court in a former proceeding, plaintiff has again become a stockholder of the company. The money in bank July 31, 1906 ($14,496.01) has been distributed to the stockholders as dividend, none of which has been paid to the plaintiff. A new board of directors and new officers have been elected, and the company still carries on the business of mining and selling coal.

"(6) A written notice was served on May 24, 1909, on the Bulls Head Coal Company to bring suit against D. J. Whiteford and the estate of C. A. Burr, deceased, and the company has neglected to do so.

"There are other paragraphs in the bill; but we need not refer to them now. The plaintiff prays for the appointment of a receiver and for various accountings.

[54] See Mason v. Carrothers, 105 Me. 392, 74 Atl. 1030 (1909).

[55] Part only of the opinion filed in the court below is given.

"It is clear that the plaintiff is before us as a stockholder of the defendant company, and, under the allegations of his bill, that he is entitled to relief either in equity or law; the main question to be considered now being one of procedure. The substance of his complaint is that certain sums of money were unlawfully diverted from the treasury of the company and paid to three individuals under the guise of salaries, and he is seeking the aid of the court to secure the return of the funds so misappropriated into the treasury of the corporation.

"There are two ways in which this can be done. Under certain conditions a stockholder may bring suit on behalf of the corporation without first requesting the managers or directors to bring such proceedings; but this may be done only under exceptional circumstances. A case in point is that of Treat v. Insurance Co., 203 Pa. 21, 52 Atl. 60. In this case the officers of the insurance company had reinsured all of its risks in another company. The company had no office, solicited no risks, and was practically defunct; in other words, the business had been abandoned. The officers, it appeared, had appropriated the funds of the company to their own use. It was held that in such a case it was not necessary for a shareholder to request the manager to apply for a receiver, before filing his bill.

"The facts of the case at bar, as gathered from the bill, are different. The defendant company is a going corporation. It has a president, secretary, treasurer, and a board of directors, and was carrying on 'the business of mining coal' when the bill was filed. It is true that there are new officers, new directors, and some new stockholders; but the corporation is an active one and is clothed with the usual corporate powers.

"The other way to secure the relief sought by the plaintiff is indicated in the case of Wolf v. Railroad Co., 195 Pa. 91, 45 Atl. 936. This case fully explains the law. Mr. Justice Mitchell says: 'The first matter for consideration is the status of the plaintiff to maintain such a bill. It is a bill to assert rights of the corporation, and therefore must ordinarily be brought by the corporation itself. The right of an individual stockholder to act for the corporation is exceptional and only arises on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management, and refusal to act are imperative requisites. And the refusal by the corporate management must appear affirmatively to be a disregard of duty, and not an error of judgment, a nonperformance of a manifest official obligation, amounting to a breach of trust. 2 Beach on Private Corporations, § 878. There must be averred and proved an actual application to the directors, and a refusal by them to bring suit or to allow plaintiff to do so in the corporate name, and where misconduct of the directors themselves is alleged, the bill must show an effort to secure plaintiff's rights through meetings of the corporation. 2 Beach on Private Cor-

porations, §§ 882, 885. "The shareholder should set forth in his bill the efforts that he has made to induce the corporation to act in the matter, should allege its refusal or failure to sue," and "facts showing that he has left undone nothing which in reason he might have done to prevail on the corporate management to bring the action." Taylor on Private Corporations, §§ 138, 140. See, also, Morawetz on Private Corporations, §§ 241, 244.'

"The counsel for plaintiff appears to have followed the procedure suggested in Wolf v. Railroad Co., 195 Pa. 91, 45 Atl. 936, because he attempted to comply with the requirement of notice to the corporation. A copy of the notice is attached to plaintiff's bill as 'Exhibit A.' We hold this notice to be insufficient. It is directed to the 'Bulls Head Coal Co.; S. S. Spruks, President; C. Comegys, Esq., Attorney—Gentlemen: You are hereby notified to bring suit,' etc. A corporation is managed by its board of directors, and as is stated in the case cited: 'There must be averred an actual application to the directors, and a refusal by them to bring suit.'

"We hold also that the notice ought to state specifically the parties against whom the corporation is to bring suit. Only in an inferential way can this be gathered from the notice in this case.

"We are not called upon to decide the question of the right of the plaintiff to bring suit in his own name, rather than in his name for the benefit of the corporation, the Bulls Head Coal Company. If the money alleged to have been misappropriated by the former officers of the company were recovered in legal proceedings, the sum so recovered should go into the treasury of the company, and the plaintiff would thereby reap a profit depending upon the amount of stock held by him and depending also upon the financial condition of the company at the time. The money recovered in such a suit after satisfying creditors would belong to the stockholders of the company and could be distributed among them as dividends. As an illustration we can use the facts set forth in the bill. During a period of about two years the sum of $49,000 was paid in the form of salaries to three persons who controlled the corporation. Supposing that $4,000 would have been a fair compensation for their services, the balance of $45,000 would be the amount of the misappropriation. Because the plaintiff owns five shares of the stock, or $^1/_{45}$ of the capital, it does not follow that he would be entitled to that proportion of the money recovered in a suit. His right as a stockholder to a distributive share of the assets of the company would depend on other factors in the equation.

"Reducing the plaintiff's case, as set forth in his bill, to its lowest terms, it means that the directors of the defendant company, being trustees for all the stockholders, are under a legal obligation to bring suit against certain alleged wrongdoers to recover certain sums of money belonging to the company; and that, the said directors failing

in this duty after notice, the plaintiff has the right to bring such a suit for and in behalf of the corporation. This is the substance of the plaintiff's case.

"It should be understood that we sustain the demurrer in this case on the single ground of the insufficiency of the notice exhibited in plaintiff's bill, leaving open the other questions, which are not specifically raised by the demurrer. The nature of the case is such that the plaintiff's bill cannot be amended.

"Now, March 7, 1910, the demurrer is sustained, and the plaintiff's bill is dismissed, with costs."

PER CURIAM. The judgment is affirmed on the opinion of the learned court below.

WRIGHT et al. v. FLOYD et al.

(Appellate Court of Indiana, 1909. 43 Ind. App. 546, 86 N. E. 971.)

HADLEY, J. Appellants sued appellees to set aside a judgment against the United Brethren Publishing Establishment, a corporation, and in favor of the Local Endowment Board for Central Church of the United Brethren in Christ of Rohrersville, Md., which, it is averred, was based upon a fraudulent claim and a fraudulent confession of judgment, all to the knowledge of all of the parties interested. It is averred: "That appellants, together with appellees Floyd, Barnaby, Tharp, and Montgomery, constitute the board of trustees of the appellee, United Brethren Publishing Establishment, and have the management of its affairs; that said named appellees constitute the majority of the board of trustees of said corporation, and over the protests of appellants did and performed the acts complained of, and appellants bring said action for the use and benefit of said publishing establishment. It is nowhere averred that appellants are members either of the corporation or of the church, for whose benefit the printing establishment was operated, or that they have any interest whatever in the controversy either as shareholder, stockholder, member, or beneficiary. Moreover, it is apparent from the averments of the complaint that appellants seek to bring the suit as minority trustees and in their trust capacity for the benefit of the corporation.

The question we are called upon to decide is whether they thereby show sufficient interest to prosecute this suit. It cannot be said that the corporation is prosecuting the suit, since the corporation only acts by a majority of its board of trustees, or at least a majority of a quorum present. Price v. Railroad Co., 13 Ind. 58; 2 Cook, Corp. (5th Ed.) § 712. And it is well settled that one or more members and less than such majority of a board cannot bind the corporation to any action. 2 Cook, Corp., supra; Noblesville, etc., Co. v. Loehr, 124 Ind. 79, 24 N. E. 579; Allemong et al. v. Simmons et al., 124 Ind. 199, 23 N. E. 768. In 2 Cook, Corporations, supra, the learned author says: "All

contracts of a corporation are to be made by or under the direction of its board of directors. The board of directors make corporate contracts by a regular vote of the board. * * * The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into are entered into by and through the board of directors. The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens, and contracts generally of the corporation. They appoint the agents, direct the business, and govern the policy and plans of the corporation. * * * They institute, prosecute, compromise, or appeal suits at law and in equity which the corporation brings or has brought against it. But there are limitations on their powers. If the board of directors attempt to do an act or make a contract which the corporate charter does not give the corporation the power to do or enter into, then any stockholder may enjoin that act or contract. Moreover, the directors can contract and act only as a board, duly notified and assembled. The members of the board cannot agree separately and outside of the meeting and thereby bind the corporation. Nor can a minority of the board meet and bind the board. A majority must be present, and then a majority of that majority binds the corporation. A single director has no power to contract for the corporation."

Neither can it be said that they are bringing the suit as interested members, since there is no averment of their being such. It does not appear that they have any personal interest in the controversy.

It is well settled that shareholders or stockholders in a corporation, or an interested member, may bring suit on behalf of the corporation to protect the interest of the corporation and incidentally the interest of the members; but, in doing so, their interest must be shown, and it also must be shown that a demand has been made upon the corporation to protect such interest, and a refusal so to do, or such facts be exhibited as show that such demand would be unavailing. Carter v. Glass Co., 85 Ind. 180; Sheridan Brick Works v. Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207; Tevis v. Hammersmith, 31 Ind. App. 281, 66 N. E. 79, 912; Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487; 3 Cook, Corp. (5th Ed.) § 750.

But we have made diligent search and have been unable to find any authority warranting a member of the board of trustees or directors to bring such a suit in his trust capacity, or in his personal capacity, solely by reason of his interest on account of such membership, since such membership gives him no personal interest. In the absence of a statute or rule of the corporation, a member of a board of directors or trustees does not necessarily have to be a member or shareholder of such corporation. 1 Cook, Corp. (5th Ed.) § 11.

The complaint does not show under what statute the appellee printing establishment was organized, neither does it aver any rule requiring the trustee of such corporation to be a member, and under such circumstances the mere averment of plaintiff that he is a member of

the board of trustees is not sufficient to show such interest as to authorize the prosecution of suits of this character. It is clear that where a suit is prosecuted, as this is prosecuted on behalf of the corporation by minority members of the board of trustees, a determination of such cause would not be an adjudication of the rights of the corporation in the controversy since the corporation does not prosecute the suit. Nor would it be an adjudication of the right of a member or shareholder to prosecute such a suit in the name of the corporation, since it does not appear that such member or shareholder has so prosecuted the same.

Judgment affirmed.[56]

FORREST v. MANCHESTER, S. & L. R. CO.

(High Court of Chancery, 1861. 4 De Gex, F. & J. 126.)

This was the appeal of the plaintiff from the dismissal of his bill by the Master of the Rolls. The plaintiff was a shareholder in the Manchester, Sheffield and Lincolnshire Railway Company, and sued on behalf of himself and the other shareholders of the company for an injunction to restrain the defendants from conveying in vessels or boats passengers, cattle, or goods from Hull or Grimsby to Spurn Point. * * *

Evidence was gone into, and the plaintiff on his cross-examination admitted that he held only £82 stock in the railway company, but was the holder of twelve £30 shares in the packet company, which was paying a dividend of £10 per cent; and that the excursion traffic had been continued for eight or ten years. He also admitted that the directors of the packet company had directed the institution of the suit, and indemnified him against costs. The Master of the Rolls dismissed the bill on the ground that the act sought to be restrained was not ultra vires.[57]

THE LORD CHANCELLOR (WESTBURY). In this case I am asked to reverse the order of the Master of the Rolls dismissing this bill with costs. I desire it to be distinctly understood that my decision does not proceed upon the grounds stated by the Master of the Rolls. It is unnecessary for me to express any opinion upon the ground stated by His Honor which, if they are correct, would be confined entirely to this particular case, because they have reference to the peculiar constitution of the present company. But the ground upon which I proceed is entirely that of personal exception to the character of the plaintiff and the foundation of my decision is contained in this passage of the plaintiff's own examination not attempted to be qualified or questioned. He says in that examination, "The directors of the

[56] Compare Baldwin v Canfield, 26 Minn. 43, 1 N W. 261, 276 (1879).

[57] Part of the statement is omitted.

packet company directed the institution of this suit and indemnify me against costs." It is not that they persuaded him to institute the suit, not that they instigated the suit, but that the directors of the other company have "directed the suit," and are to indemnify the plaintiff against the cost of it. To use a familiar expression, the plaintiff is the puppet of that company.

It has been a very wholesome doctrine of this Court that one shareholder having in view the legitimate purposes of the company may be permitted in this Court to maintain a suit on behalf of himself and the other shareholders of the company, but the principle upon which that constructive representation of the shareholders is permitted indisputably requires that the suit shall be a bona fide one, faithfully, truthfully, sincerely directed to the benefit and the interests of those shareholders whom the plaintiff claims a right to represent. But can I permit a man who is the puppet of another company to represent the shareholders of the company against whom he desires to establish the interests and benefits of a rival scheme? That would be entirely contrary to the principle upon which this constructive representation has been permitted to be founded. When the plaintiff sues in that capacity any personal exception to the plaintiff remains, and it would be in direct contradiction of every principle of truth and justice if I permitted a man to come here clothed in the garb of a shareholder of company A., but who is in reality a shareholder in company B., and has no sympathy whatever with, no real purpose of promoting the interests of the other company. Such a thing would be so much at variance with the principles of a court of equity that it would be impossible for it to entertain a suit of that description which is a mere mockery, a mere illusory proceeding.

It is however, said that this objection was considered some years ago in the well-known case of Colman v. Eastern Counties Railway Company, 10 Beav. 1, and was overruled by the late Master of the Rolls, Lord Langdale. All I mean to say about that case is that the objection there proceeded upon a different ground. The proposition of Lord Langdale is that it is no ground of personal exception to a plaintiff that he has been instigated to institute his suit by another company. If the proposition be limited to the extent of the words in which it is expressed, possibly there may be no exception to that proposition, but undoubtedly I would not assent to it if carried one jot beyond those limits. I desire, however, to point out again the wide difference which exists between a suit "directed" to be instituted by the directors of another company, and a suit which is bona fide instituted by the plaintiff, persuaded only to the institution of it by the arguments of another company. In the one case the suit is the suit of the plaintiff, and is for aught that appears instituted at the peril of the plaintiff. In the other case, the whole origin of the suit and the direction and conduct of it

emanate altogether from the other company, and the suit would have no existence whatever but for the order of the other company. I consider, therefore, that the language in which the Master of the Rolls expresses himself upon the proposition then submitted to him does not in the smallest degree interfere with or weaken the ground that I have taken.

I have nothing to do with the motives of the plaintiffs suing in this Court. If they come here in a bona fide character, the reason for their coming here is a matter beyond the province of a court of justice to inquire into. See Kerr, Inj. 549. But if a man comes here representing to me that he is a bona fide shareholder in a company, and that it is the bona fide suit of that company, and it turns out not to be the suit of that company, but in reality to be in its origin and its very birth and creation the suit of another company, then I repeat that this is an illusory proceeding, and ought not to be attended to by the Court. The well-known words,—the trite quotation,—will occur to the minds of those who hear me. Fabula non est judicium in scena, non in foro res agitur. If this gentleman be permitted to come and assume merely for the purpose of coming into this Court the garb of a shareholder, but at the same time explicitly announces, "This suit is not directed to the purposes of that company; I have nothing in common with the shareholders of that company; it has not emanated from the wish of the shareholders; it does not emanate from me as a shareholder; it is not my act; I am directed to do it by another party, and another body of men," then in point of fact the suit is not the expression of his own will, nor is it the legitimate prosecution of his own interests or his own objects, but it is the prosecution of the interests and objects of persons who have no right whatever to invoke the interference of this Court.

I treat this suit as an imposition on the Court. By these words I mean no reflection upon the plaintiff himself, because he has told the truth, and does not appear at any time to have desired to conceal it. But as he comes here in the character of a shareholder in the company, and tells me frankly that the institution of the suit is not his own act, but an act that he has been directed to do by the other company, then, using the words without offence, I denominate that suit an imposition on the Court, and I dismiss it accordingly, and affirm, though on a different ground, the order that has been made.

I refuse this application with costs.[58]

[58] See Hodge v. United States Steel Corporation, 64 N. J. Eq. 111, 53 Atl. 553 (1902).

POLLITZ v. GOULD et al.

(Court of Appeals of New York, 1911. 202 N. Y. 11, 94 N. E. 1088.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 13, 1911, which affirmed an order of Special Term denying a motion to dismiss the complaint upon the pleading.

The following questions were certified: "1. Does the fact that the plaintiff acquired his stock of the defendant, the Wabash Railroad Company, upon which he bases his right to ask the court to enforce a cause of action in favor of the railroad company against the individual defendants, after all the transactions which the plaintiff insists imposed a liability in favor of the railroad company against the individual defendants had been consummated, all stocks and bonds issued and the transactions complained of in all respects completed, prevent the plaintiff from maintaining this action? 2. Is the enforcement of such a cause of action confined to stockholders who actually owned stock at the time the transactions complained of were consummated and completed?"

The nature of the action and the facts, so far as material, are stated in the opinion.

HISCOCK, J. This action was brought by plaintiff as a stockholder in the Wabash Railroad Company in behalf of said company, for the benefit of himself and all other stockholders, to set aside as fraudulent a transfer and exchange of several millions of dollars par value of its stock for an equivalent amount of the capital stock of the Wabash Pittsburg Terminal Railway Company. It is unnecessary to go into the details of the transaction which is being attacked by the plaintiff through and in behalf of the company, for the sole question presented for our consideration may be discussed without doing this. This question is whether a stockholder may bring an action of this character for the purpose of avoiding an improper transaction consummated at the expense of the corporation before he acquired his stock, and as presented here the question is unembarrassed by any incidental considerations, as that the prior holder of the stock consented to the transaction, or that plaintiff's subsequent acquisition of the stock was accompanied by any circumstances which would render it inequitable for him to seek relief.

While somewhat strangely this question does not appear to have been decided by this court, it has been passed on by the lower courts of this state, and by those of many other states, and by the Supreme Court of the United States. It has also been somewhat considered by the courts of England. Conflicting conclusions have been reached by these decisions. Without reviewing the English authorities, which so far as cited do not seem to be very decisive, reference may be made to the decisions in this country.

The question was presented in Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, and it was there held that a stockholder might not bring an action in behalf of the corporation to avoid a fraudulent transaction consummated before he acquired his stock. While the question was directly passed on it is fair to state that it was not considered at any great length, and that the court seems to have been more concerned with establishing this rule as one of practice than of substantive law. The decision resulted in the adoption of a rule requiring the plaintiff in such an action to show, before bringing suit, that he owned the stock on which it was brought at the time the transaction complained of occurred, and, whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts.

In addition, this rule in such a stockholder's action has been approved in the following cases: Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; Boldenweck v. Bullis, 40 Colo. 253, 90 Pac. 634; Rankin v. S. W. B. & I. Co., 12 N. M. 54, 73 Pac. 614; Moore v. Silver Valley Co., 104 N. C. 534, 10 S. E. 679; Clark v. American Coal Co., 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557; Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716.

The contrary doctrine that a stockholder acquiring his stock subsequent to the occurrence complained of may maintain this character of an action has been affirmed in the following cases outside of this state: Winsor v. Bailey, 55 N. H. 218; City of Chicago v. Cameron, 22 Ill. App. 91, affirmed 120 Ill. 447, 11 N. E. 899; Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 South. 1006; Forrester v. B. & M., etc., Co., 21 Mont. 544, 565, 55 Pac. 229, 353; Just v. Idaho, etc., Co., 16 Idaho, 639, 102 Pac. 381, 133 Am. St. Rep. 140; Rafferty v. Donnelly, 197 Pa. 423, 47 Atl. 202; Appleton v. Am. Malting Co., 65 N. J. Eq. 375, 54 Atl. 454. It has also been approved in this state, directly or indirectly in the following cases: Ramsey v. Gould, 57 Barb. (N. Y.) 398; Young v. Drake, 8 Hun (N. Y.) 61; Ervin v. Oregon Ry. & N. Co., 35 Hun (N. Y.) 544; Frothingham v. Broadway & Seventh Ave. R. R. Co., 9 N. Y. Civ. Proc. R. 304; Sayles v. Central Nat. Bank, 18 Misc. Rep. 155, 41 N. Y. Supp. 1063; O'Connor v. Virginia P. & P. Co., 46 Misc. Rep. 530, 535, 92 N. Y. Supp. 525.

Assuming this question to be an open one in this court, we have no hesitation in approving the rule, which has heretofore prevailed in this state, that in the absence of special circumstances this character of action may be maintained by a stockholder acquiring his stock subsequent to the transaction which is challenged, rather than the contrary one prevailing elsewhere. We do this, not only because a long and uniform line of decisions by our own courts ought to have weight, but because the rule established by these decisions seems to be the sounder one.

A stockholder has an indivisible interest in the property and assets of a corporation, subject to the discharge of its obligations. This indivisible interest, generally speaking, is represented by certificates of stock, and is transferred by their transfer. The general character of these certificates, and the effect of their transfer in passing the interest of the holder, is too well established and understood to require any discussion. As an original proposition it would seem to be clear that a right of action by or in behalf of the corporation for fraud, to set aside a conveyance of its assets, or to avoid obligations imposed upon it, is part of its rights, property, and assets, in which a stockholder has this indivisible interest, transferable by the transfer of his certificates. I am unable to see any real or substantial distinction by virtue of which a stockholder, transferring his certificates, would transfer all of his indivisible interest in bonds or real estate on hand, but would not transfer his interest in a right of action to recover bonds or real estate which had been fraudulently withdrawn from the possession of the corporation, and which it was entitled to recover; and if the subsequent holder, by acquiring the certificates, does acquire such latter interest, it seems to follow that he may, if necessary, in behalf of the corporation, assert and prosecute an action to protect and enforce the same.

Brief reference may be made to some of the reasons advanced in opposition to this view. Counsel points out practical inconvenience which he says will result from its application, owing to the difficulties in tracing stock and distinguishing that which has not assented to the transaction from that which has, or from that which perhaps has been issued since its consummation. These arguments, however, are so counterbalanced by corresponding claims from the opposite standpoint as to be of little weight.

Again, it is argued that, if one buys stock subsequent to the transaction, he should be regarded as buying subject to it, and not be permitted to question it. If the prior holder should give binding consent to the transaction, this under certain circumstances undoubtedly would prevent the subsequent purchaser from questioning it. But, in the absence of special circumstances, I fail to see any principle of estoppel or logic which makes a subsequent purchase of stock so subject to a fraudulent corporate transaction that the purchaser may not insist upon its being set aside. There is scarcely any analogy between the situation of one who buys from an individual property which has been subjected to a transaction which has not been disaffirmed, and that of one who purchases stock in a corporation which has the continuing right both before and after the purchase, to disaffirm a wrong which has been perpetrated on it by its agents. There is little or no basis for the practical consideration that one who buys stock should be deemed to have adjusted his price to an existing transaction, even though voidable. If he knows of it, he may just as properly be

assumed to have adjusted his price to the knowledge that the transaction may still be disaffirmed and avoided.

Then, lastly, an argument is made which seems to be founded on the idea that, in order to bring an action of this nature, the stockholder must in effect disaffirm the corporate transaction, and that this disaffirmance involves a personal right of election, which vests in the one holding the stock when the transaction is consummated, and which cannot be transferred. It is said "the right to question a fraud is not a purchasable commodity," and is not "capable of assignment and transfer," and does not pass "as an implied incident to every sale of corporate stock," and this view seems to be supported by some of the many cases which have been collected and reviewed by counsel with manifest industry and care.

So far as this argument means to assert that a mere naked right to question a corporate transaction could not be transferred to a stranger, if such an attempt can be conceived of, it may be assumed to be true. But the assertion that the right to protect stock by procuring an improper corporate transaction to be vacated does not pass on a transfer of the stock is a very different proposition.

The election to disaffirm a fraudulent corporate transaction belongs to and is exercised in the right and name of the corporation, and not of the stockholder. The stockholder demands that the right shall be exercised and the cause of action be prosecuted by the corporation, or does it himself for the corporation. It is conceded that the one holding the stock when the fraud is consummated has this right. When he transfers his certificates, the transaction still stands, a continuing wrong, impairing the surplus of the company and affecting the stock. If the transferee has the right to have it avoided, this will protect and increase the value of his stock. If he has not acquired this right, it is the only one held by his predecessor in or through the corporation, which has been thought of, which has not been transferred by the transfer of the stock. It will be an anomalous exception if the prior holder retains the right to maintain or have maintained this action, while he passes all of his other rights by the transfer of his stock.

The only justification pleaded for this is the idea suggested of a personal and nontransferable right of election to disaffirm vested in the original holder. But this theory is entirely unsubstantial. Such prior holder does not acquire this right to object to the transaction and bring an action to set it aside as a power conferred upon him by reason of any personal qualities, but because of his character as a stockholder, and when he loses this character, and transfers it to another with his stock, there is no reason why the latter should not exercise the right as a proper and necessary incident to his stock ownership.

The order should be affirmed, with costs, and both questions certified to us answered in the negative.

CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

Order affirmed.[59]

SEATON v. GRANT.

(Court of Appeal in Chancery, 1867. L. R. 2 Ch. App. 459.)

This was an appeal from an order made on the 12th of February, 1867, by Vice-Chancellor Malins, refusing an application of the defendants that the bill might be taken off the file, or that all further proceedings might be stayed.

The bill was filed by Charles Seaton, on behalf of himself and all other shareholders in the Credit Foncier and Mobilier of England, Limited, except the defendant, Albert Grant, against Albert Grant, George Edward Seymour, and the above-named company, under the following circumstances:

The defendant, Albert Grant, was the managing director of the above-named company. The defendant, George Edward Seymour, was the chairman of a company called the City of Milan Improvements Company. The plaintiff alleged that the two last-named defendants had, in the year 1865, formed what is called a "syndicate" on the Stock Exchange; that is, a combination for the purpose of raising the value of the shares of the Milan Company to a fictitious premium; and that, with this end, Grant had purchased 12,129 shares in the Milan Company, and paid for them out of the funds of the Credit Foncier, by which the latter company had sustained a great loss, the shares of the Milan Company having fallen very much in value.

He also alleged that the defendants were taking measures to re-constitute the Credit Foncier, by dissolving the company, and transferring its assets and liabilities to a new company.

The bill prayed that the defendants, Grant and Seymour, might repay to the Credit Foncier the money expended in the purchase of the shares in the Milan Company, and that the Credit Foncier might be restrained from handing over their assets to any other company, until all their debts and liabilities had been paid and satisfied.

The bill was filed on the 19th of July, 1866, and immediately afterwards the plaintiff moved for an injunction, in terms of the prayer, before Vice-Chancellor Kindersley, who refused the motion with costs.

On the occasion of the motion, the plaintiff was cross-examined in Court, when it appeared that he held only five shares of £20. each in the Credit Foncier, which he acquired solely for the purpose of filing this bill; and that his reason for filing the bill was that he and several

[59] Accord: Just v. Idaho Land & Improvement Co., 16 Idaho, 639, 102 Pac. 381, 133 Am. St. Rep. 140 (1909).

Contra: Home Fire Insurance Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716 (1903).

of his friends had lost money by speculating in shares of the Credit Foncier, and that he was advised that if he bought shares, and then filed a bill to impeach certain transactions of which he had notice, he would probably be bought off at a high price, and so obtain compensation.

Subsequently to the filing of the bill, two extraordinary meetings of the Credit Foncier were held on the 30th of July and the 15th of August, 1866, at which resolutions were passed for winding up the company voluntarily, and for the formation of a new company, for objects which would include the carrying on of the business of the Credit Foncier.

The defendants put in answers to the bill, but refused to give full information to the plaintiff as to the transactions complained of; and their answers were excepted to by the plaintiff.

The motion now under appeal was made by the defendants Grant and the Credit Foncier, and, having been refused by the Vice-Chancellor, was now renewed before the Lords Justices.

Sir G. J. TURNER, L. J. In every case of this description, we must consider what is the nature of the case made by the bill. In the present instance, the bill complains of a gross fraud which the Plaintiff alleges to have been committed upon a company of which he is a member. The persons now moving to take the bill off the file are Mr. Grant and the company, the alleged parties to the fraud. They have not thought fit at present to put in any answer to the bill, with the exception of an answer raising the personal exception to the plaintiff, which is one of the grounds of the present motion. There is, therefore, nothing before the Court disputing the allegations of fraud contained in the bill. In this state of circumstances, the question is, whether the Court ought to interfere upon motion, as it now asked to do, to stop this suit.

In the first place, on what basis would the Court proceed in acceding to such a motion? It cannot at this stage of the proceedings be assumed as against the plaintiff, that the allegations of fraud made by the bill will necessarily be wholly displaced in the suit. Suppose that answers are put in which should contain a direct admission of the alleged fraud. Is it to be said that, if those facts were altogether admitted, the Court would interfere at once, brevi manu, to stay the proceedings or dismiss the bill?

But it is said that everything which is sought by the bill could be obtained in the winding-up proceedings. The first observation upon that is, that the resolutions to wind up the company were passed after the institution of the suit. The second observation is, that we are in total ignorance of the circumstances under which the resolution to wind up the company were passed, whether these alleged frauds were or were not brought to the attention of the meeting. The validity of those resolutions may possibly be open to dispute upon the bill as it now stands, and if it is not, the bill might be amended for the purpose of

raising the question, and it might then appear that these resolutions were passed for the express purpose of evading these charges of fraud. Another very material circumstance is this: that if the suit goes on, it will be quite in the discretion of the Court whether these charges shall be worked out in the suit or in the winding-up proceedings; and yet we are asked to stop the suit at once, on the assumption that it will be more advantageous to the company that the proceedings should be carried on under the winding-up than in the suit. I can at present see no foundation for that conclusion.

But the strongest argument which has been used in support of the motion is what may be called the personal exception to the plaintiff. Now I by no means approve of the plaintiff's conduct; but the question is, whether his conduct has been such as to deprive him of all right whatever in this suit? The plaintiff's case is, that he has sustained great loss by speculating in the shares of the company, and that he afterwards purchased a small number of its shares, and then filed this bill to impeach certain transactions by the manager of the company. Now, although I by no means approve of such conduct, yet I cannot venture to say that for this reason the Court ought to interfere upon motion to deprive a plaintiff of his rights, if, upon the hearing, he should appear to be entitled to anything.

Another objection that has been taken is the insignificance of the plaintiff's interest in the subject matter of the suit. He is, however, suing on behalf of himself and the other shareholders of the company, and I am not prepared to say that the ordinary rule as to suits for a subject matter of less value than £10. applies to a case of this kind. I see no reason for dissenting from the conclusion of the Vice-Chancellor. I might be inclined to go even farther than he has done, and to say, that even if a sufficient answer had been put in, a motion of this kind could not be acceded to. It is sufficient, however, to rest the refusal of the motion upon the ground that no answer has been put in. I must add, however, that questions of fraud are proper to be tried at the hearing of the cause, and not on such an application as this. The motion must be refused with costs.

Lord CAIRNS, L. J. This motion is one of a very novel, but of a very important character, because it asks the Court to shut the door in the face of the plaintiff, not on the merits of the case, but on the ground that he has by his conduct disentitled himself to institute the suit. The theory of the law of this country is, that every subject has a right to bring his complaint to a hearing, if it be not capable of being stopped by a demurrer or a plea. The exceptions which have been established to this rule merely shew the strength of the general rule. Those exceptions are four in number: First, where the plaintiff is required to give security for costs. That is hardly an exception, because the Court only stays the proceedings in the suit until the security is given. Second, where the defendant is willing to give to the plaintiff all the relief which he asks, and to pay his costs of the suit.

Third, where the subject matter of the litigation has perished, or has been removed, and nothing remains to be decided but the payment of costs of the suit. There the Court considers that it would be useless to allow the suit to go on to a hearing when the only question to be determined can be as well decided upon motion. Fourth, where the bill has been filed without the authority of the person who appears as the plaintiff, or where the name of a corporation has been used without a sufficient title to use it. In such a case the bill is treated as a fraud upon the Court, and is therefore ordered to be taken off the file.

The grounds alleged for the present motion are three: First, a personal exception to the plaintiff. I do not think that I unfairly represent the conclusion which the parties desire to draw from the cross-examination of the plaintiff if I put it in this way. The plaintiff had in a collateral way lost some money, and he then finds a blot in the management of the company of which he thinks the shareholders might complain. He buys five shares in the company, and then files this bill in order to induce the company to buy off the litigation. That, no doubt, is a course of conduct which would meet with little approval in this Court, or, indeed, in any other Court, and such conduct might be material at the hearing with reference to the amount of relief which the plaintiff could obtain, or whether he was entitled to any relief at all. But the question is, whether these facts are necessarily fatal to the plaintiff's claim to relief? Suppose an answer were put in admitting all the allegations contained in the bill, it would be difficult to say at this stage of the suit that the plaintiff's conduct would altogether disentitle him to relief. The case of Forrest v. Manchester, Sheffield & Lincolnshire Railway, 9 W. R. 818, which was relied upon in the argument, is distinguishable from the present case upon two grounds: First, because that was the hearing of the cause; and, secondly (and this is the main distinction), because there the Court came to the conclusion that the plaintiff was simply a puppet in the hands of another company, and that he was indemnified by that company against the costs of the suit. That objection amounted to this, that a suit professing to be the suit of Company A, was really the suit of Company B.

The second ground relied on in support of this motion was, that the plaintiff's quantum of interest in the suit was very insignificant. But if we should hold that the suit can be maintained in other respects, I think that the aggregate interest of all the shareholders in the subject matter of the suit is amply sufficient to sustain the suit.

The third ground relied upon is the resolution which has been passed to wind up the company voluntarily, and it is said that the consequence of that resolution is that the company is at an end, or that, at any rate, if any relief is to be obtained, it can be obtained in the winding-up proceedings. I give no opinion how the matter would stand if it were admitted that a winding-up of the company, either voluntarily or compulsorily, had taken place. But the complete answer to this ground of objection is this, that the bill in substance impeaches the

proceedings which have been taken to wind up the company. Before the bill was filed, two circulars respecting the intended proceedings in relation to the winding up were sent to the shareholders. The bill contains allegations directed to the invalidity of the proceedings, and a part of the prayer is for a declaration to the same effect. The allegation could not at that time have been more definite than it was; but a clear intention is shewn on the part of the plaintiff to challenge the proceedings to wind up the company. At any rate, the time for amending the bill has not yet come, and, therefore, I think that we are bound to take it that the plaintiff may be able to shew that the winding-up proceedings are invalid. I think, therefore, that all the grounds that have been stated in support of the motion fail. I do not go into the question of delay, because I prefer to rest the case on the other grounds. I think that the motion should be refused, with costs.[66]

PARSONS v. JOSEPH.

(Supreme Court of Alabama, 1891. 92 Ala. 403, 8 South. 788.)

The bill in this case was filed on the 19th day of July, 1890, by Henry Joseph, as a stockholder in the Birmingham, Powderly & Bessemer Street Railroad Company, against the said corporation and J. H. Parsons, and sought the cancellation of certain certificates of stock issued by the corporation to said Parsons, on the ground that the stock was fictitious and fraudulent. There was a demurrer to the bill, and a motion to dissolve the injunction, each of which was overruled; and this appeal is sued out by the defendants from that interlocutory decree.

COLEMAN, J. The purpose of the bill is to have certain certificates of stock issued by the Birmingham, Powderly & Bessemer Street Railroad Company to defendant Parsons canceled, on the ground that the stock is fictitious, and was issued in violation of the constitution and statute law of the state. The bill prayed an injunction, and the writ was awarded by the chancellor. A demurrer was interposed, and also an answer by the defendant Parsons. The cause was submitted for decree on the demurrer, and upon motion to dissolve the injunction. The court overruled the demurrer, and denied the motion to disolve the injunction, and from this interlocutory decree the appeal is taken.

Among other averments, the bill substantially alleges that plaintiff is a bona fide stockholder in said company; that shortly after the organization of the company the defendant subscribed for 107 shares of the capital stock of the company, of the par value of $50 each, and paid for the same in full by conveying to the company 39 acres of land,

[66] Contra: Pitcher v. Lone Pine-Surprise Consolidated Mining Company, 39 Wash. 608, 81 Pac. 1047 (1905).

(describing the land,) at an agreed price and valuation of $137 per acre, when the land was not worth more than $25 per acre, and for this land Parsons was to receive 107 shares of the stock; that shortly thereafter the capital stock of the company was doubled, and, without further consideration than the 39 acres of land, Parsons' stock was doubled, and he received 214 shares of the capital stock. The bill, as amended, charges that the excessive valuation of the land was made knowingly, willfully, and with the fraudulent intent of having issued to Parsons the fictitious stock, in violation of law. This is a sufficient statement of the facts for the consideration of the demurrer.

The demurrer admits the truth of the averments. It is contended that the bill is defective, in not averring that plaintiff was a stockholder at the time of the transaction complained of as being fraudulent, or that his stock devolved upon him by operation of law. In the case of Dimpfel v. Railroad Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121, relied upon by appellants, it was held that a stockholder, contesting as ultra vires an act of the directors, should aver "that he was a stockholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law." To the same effect was Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, and many others might be cited. Upon an examination of these authorities, it will be seen that the principle asserted rests solely upon equity rule No. 94, adopted by the United States supreme court, and which may be found in the preface to volume 104 of the United States Reporter. Morawetz on Private Corporations, speaking of this rule, says it was evidently designed as a rule of practice merely, and was deemed necessary to guard courts from being imposed upon by collusion of parties. Mor. Priv. Corp. §§ 269, 270. The rule is not a general principle of law, applicable to pleadings in all the courts, and has never been applied to the courts of this state. The demurrer to the bill for failing to make this averment was properly overruled.

The motion to dissolve the injunction was heard upon the sworn bill and answer. The answer denied that plaintiff was a bona fide stockholder, and set up that plaintiff was the transferee of one E. Lesser. The answer admits that defendants' stock was doubled without the payment of any additional consideration than that of the land; but, by way of explanation and defense, avers the lands were not truly and properly valued at first, and the increased valuation of the lands only raised them to their real and true value, and the additional issue of stock was for property at its fair valuation. The answer continues, however, as follows: That if said transaction had been illegal and fraudulent, and not done in good faith, complainant is estopped from setting up fraud in said transaction, or seeking to cancel said stock, because E. Lesser, who was complainant's transferrer, participated in all of said transactions, and himself fixed the value of said lands, with full knowledge of, and after full investigation of, the value of said land.

A transferee of stock is not necessarily disqualified as a suitor in all cases, because the prior holders were personally disqualified. If the transferee purchased the shares in good faith, and without notice of the fact that the prior holder had precluded himself from suing, he would have as just a title to relief as if he had purchased from a shareholder who was under no disability; but if the purchaser was aware that the prior holder had barred his right to relief, neither justice nor public policy would require that the transferee, under these circumstances, should be accorded any greater rights than his transferrer. Id. § 267. The same rule prevails in this state in favor of derivative purchasers. A claimant who was a bona fide purchaser, without notice of a fraud, or of facts which the law considers sufficient to establish it, or from which it is inferable, then he could not be affected by a notice to his vendor. Horton v. Smith, 8 Ala. 78, 42 Am. Dec. 628; Fenno v. Sayre, 3 Ala. 458; Wier v. Davis, 4 Ala. 442; Martinez v. Lindsay, 91 Ala. 334, 8 South. 787; Wait, Insolv. Corp. §§ 628, 630.

If a stockholder participates in a wrongful or fraudulent contract, or silently acquiesces until the contract becomes executed, he cannot then come into a court of equity to cancel the contract, and more especially if the company or himself as a stockholder has reaped a benefit from the contract; and this rule holds good, although the consideration of the contract may be one expressly prohibited by statute. The same disability would attach to the transferee of his stock who bought with notice. We consider this general rule of equity abundantly sustained. Mor. Priv. Corp. §§ 261, 262; Cook, Stocks, §§ 39, 40, 735; Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412. It is sustained by the familiar rule that he who invokes the aid of a court of equity must have clean hands. Mr. Cook states the conditions upon which a stockholder can sustain a suit to remedy the frauds, ultra vires acts, or negligence of directors to be—First, the acts complained of must be such as to amount to a breach of trust, and such as neither a majority of the directors nor of the stockholders can ratify or condone; second, that the complaining stockholder himself is free from laches, acquiescence in the acts to remedy which the suit is brought; third, that the corporation has been requested, and refused or neglected, to institute the suit, that the suit is instituted by bona fide stockholders as complainants, and that the corporation and the guilty parties, and other proper parties, have been made defendants. Cook, Stocks, § 646.

If the averments of the bill are sustained by proof, the stock issued to the defendants was in violation of section 1662 of the Code, and of section 6, art. 14, of the constitution. On the contrary, if the proof shows that the property was received in payment of stock, at a fair valuation, such would not be the result. Davis v. Chemical Co., 101 Ala. 127, 8 South. 496.

In cases where the stockholders or the company, by any laches, acquiescence, or participation in the unlawful and fictitious issue of stock, or for any other sufficient cause, are precluded from instituting the proper proceedings to remedy the wrong, the remedy is still open to the state to institute all necessary and proper proceedings to vacate and dissolve the corporation, or have such other proper judgments and decree rendered as the proof and justice may demand.

It may be that stockholders who knowingly and intentionally have subscribed and paid for stock with property upon a fictitious valuation are liable as stockholders who have not paid up in full for their stock, within the meaning of the statute, to creditors who have not precluded themselves from maintaining the suit. Wait, Insolv. Corp. § 593; Douglass v. Ireland, 73 N. Y. 100; Boynton v. Andrews, 63 N. Y. 93.

Applying the rule of law applicable when a motion to dissolve an injunction is submitted upon bill, exhibits, and answer, and considering only so much of the answer as is responsive to the bill, we are of opinion that the decretal order, overruling the demurrers and motion to dissolve the injunction, is free from error. Affirmed.[61]

HAWES v. OAKLAND.

(Supreme Court of the United States, 1881. 104 U. S. 450, 26 L. Ed. 827.)

MILLER, J. This is an appeal from a decree in chancery dismissing the complainant's bill, wherein he, a citizen of New York, alleges that he is a stockholder in the Contra Costa Water-Works Company, a California corporation, and that he files it on behalf of himself and all other stockholders who may choose to come in and contribute to the costs and expenses of the suit.

The defendants are the city of Oakland, the Contra Costa Water-Works Company, and Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, and John W. Coleman, trustees and directors of the company.

The foundation of the complaint is that the city of Oakland claims at the hands of the company water, without compensation, for all municipal purposes whatever, including watering the streets, public squares and parks, flushing sewers, and the like, whereas it is only entitled to receive water free of charge in cases of fire or other great necessity; that the company comply with this demand, to the great loss and injury of the company, to the diminution of the dividends which should come to him and other stockholders, and to the decrease in the value of their stock. The allegation of his attempt to get the directors to correct this evil will be given in the language of the bill.

[61] Contra: Ffooks v. Southwestern Railway Company, 1 Smale & G. 142 (1853); Boldenweck v. Bullis, 40 Colo. 253, 90 Pac. 634 (1907).

He says that "on the tenth day of July, 1878, he applied to the president and board of directors or trustees of said water company, and requested them to desist from their illegal and improper practices aforesaid, and to limit the supply of water free of charge to said city to cases of fire or other great necessity, and that said board should take immediate proceedings to prevent said city from taking water from the works of said company for any other purpose without compensation; but said board of directors and trustees have wholly declined to take any proceedings whatever in the premises, and threaten to go on and furnish water to the extent of said company's means to said city of Oakland free of charge, for all municipal purposes, as has heretofore been done, and in cases other than cases of fire or other great necessity, except as for family uses hereinbefore referred to; and your orator avers that by reason of the premises said water company and your orator and the other stockholders thereof have suffered, and will, by a continuance of said acts, hereafter suffer, great loss and damage."

To this bill the water-works company and the directors failed to make answer; and the city of Oakland filed a demurrer, which was sustained by the Court and the bill dismissed. The complainant appealed.

Two grounds of demurrer were set out and relied on in the Court below, and are urged upon us on this appeal. They are:

1. That appellant has shown no capacity in himself to maintain this suit, the injury, if any exists, being to the interests of the corporation, and the right to sue belonging solely to that body.

2. That by a sound construction of the law under which the company is organized the city of Oakland is entitled to receive, free of compensation, all the water which the bill charges it with so using.

The first of these causes of demurrer presents a matter of very great interest, and of growing importance in the courts of the United States.

Since the decision of this court in Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401, the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their natural, their lawful, and their appropriate forum. It is not difficult

to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a Court of Chancery; namely, one against his own company, of which he is a coporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal court as the corporation and its stockholder. If so, he make no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction.

That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member.

The case before us goes beyond this. This corporation, like others, is created a body politic and corporate, that it may in its corporate

name transact all the business which its charter or other organic act authorizes it to do.

Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts, and incur liabilities, and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.

The principle involved in the case of Dodge v. Woolsey permits the stockholder in one of these corporations to step in between that corporation and the party with whom it has been dealing, and institute and control a suit in which the rights involved are those of the corporation, and the controversy is one really between that corporation and the other party, each being entirely capable of asserting its own rights.

This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, cannot be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary powers of a court of equity. It is, therefore, always a question of equitable jurisprudence, and as such has, within the last forty years, received the repeated consideration of the highest courts of England and of this country.[62] * * *

The case of Dodge v. Woolsey, decided in this court in 1855, is, however, the leading case on the subject in this country.

And we do not believe, notwithstanding some expressions in the opinion, that it is justly chargeable with the abuses we have mentioned. It was manifestly well considered, and the opinion is unusually long, discussing the point now under consideration with a full reference to the decisions then made in the courts of England. The suit—a bill in chancery—was brought in the Circuit Court for the District of Ohio, by Woolsey, a stockholder of the Commercial Bank of Cleveland, and a citizen of Connecticut, against that bank, its managing directors, and Dodge, tax-collector of the county in which the bank was situated, citizens of Ohio. The bill alleged that Dodge had levied upon property of the bank to make collection of a tax, which by the Constitution of the State of Ohio the bank was bound to pay; that in that respect the Constitution, then recently adopted,

[62] Part of the opinion, containing a discussion of authorities, is omitted.

impaired the obligation of the contract of the State with the bank, contained in its charter. It appeared in the case that Woolsey had, by letter directed to the board of directors, requested them to institute proceedings to prevent the collection of this tax; but the board, by a resolution, declined to take any such action, while expressing their opinion that the tax was illegal.

In the opinion of the court, reciting the circumstances which justified its interposition at the suit of the stockholder, the allegation of the bill is adverted to, that if the taxes are enforced it will annul the contract with the State concerning taxation, and that the tax is so onerous upon the bank that it will compel a suspension and final cessation of its business. The following extract from Angell & Ames on Corporations is cited with approval: "Though the result of the authorities clearly is that in a corporation, when acting within the scope of, and in obedience to, the provisions of its constitution, the will of the majority, clearly expressed, must govern, yet beyond the limits of the act of incorporation the will of the majority cannot make the act valid, and the power of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension or simple negligence on the part of the directors." And the court adds: "It is obvious from this rule that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought."

A very large part of the opinion is devoted to the consideration of the high function of this court in construing the Constitution of the United States, and it is impossible not to see the influence on the mind of the writer of that opinion of the fact that the only question on the merits of the case was one which peculiarly belonged to the Federal judiciary, and especially to this court to decide; namely, whether the Constitution of the State of Ohio violated the obligation of the contract concerning taxation found in the charter of the bank.

As the law then stood there was no means by which the bank, being a citizen of the same State with Dodge, the tax-collector, could bring into a court of the United States the right which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a State court from the Supreme Court of the United States.

That difficulty no longer exists, for by the act of March 3, 1875, c. 137 (18 St. pt. 3, p. 470), all suits arising under the Constitution or laws of the United States may be brought originally in the Circuit Courts of the United States without regard to the citizenship of the parties. Under this statute, if it had then existed, the bank, in

Dodge v. Woolsey, could undoubtedly have brought suit to restrain the collection of the tax in its own name, without resort to one of its shareholders for that purpose.

And this same statute, while enlarging the jurisdiction of the Circuit Courts in cases fairly within the constitutional grant of power to the Federal judiciary, strikes a blow, by its fifth section, at improper and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them. It declares, if at any time in the progress of a case, either originally commenced in a Circuit Court, or removed there from a State court, it shall appear to said court "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was removed."

It is believed that a rigid enforcement of this statute by the Circuit Courts would relieve them of many cases which have no proper place on their dockets.

This examination of Dodge v. Woolsey satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of Congress referred to leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders;

Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in

exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.

It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court.

He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action. No attempt to consult the other shareholders to ascertain their opinions, or obtain their action. But within five days after his application to the directors this bill is filed. There is no allegation of fraud or of acts ultra vires, or of destruction of property, or of irremediable injury of any kind.

Conceding appellant's construction of the company's charter to be correct, there is nothing which forbids the corporation from dealing with the city in the manner it has done. That city conferred on the company valuable rights by special ordinance; namely, the use of the streets for laying its pipes, and the privilege of furnishing water to the whole population. It may be the exercise of the highest wisdom to let the city use the water in the manner complained of. The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders

residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors.

If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?

This question answers itself, and without considering the other point raised by the demurrer, we are of opinion that it was properly sustained, and the bill dismissed, because the appellant shows no standing in a court of equity,—no right in himself to prosecute this suit. Decree affirmed.

KIMBALL v. CITY OF CEDAR RAPIDS.

(Circuit Court of the United States, 1900. 99 Fed. 130.)

SHIRAS, District Judge.[68] From the averments in the bill filed in this case it appears that the complainant is a stockholder in the Cedar Rapids Water Company, and in that capacity he seeks by this proceeding to restrain the city of Cedar Rapids and its officials from publishing and putting in force an ordinance adopted by the city council fixing the rates to be charged by the waterworks company for supplying water to the city and its inhabitants, it being averred that the rates and provisions of the ordinance adopted are such that it would prevent the earning of sufficient money by the company to enable it to pay a dividend to the stockholders after providing for the expenses and outlay incident to the management of the plant of the waterworks company and the interest upon the bonded debt of the company; and, furthermore, that the putting in force of the ordinance would be a violation of a contract now in force between the city and the waterworks company, regulating the rates to be charged and the purposes for which water is to be furnished for city use. It is further expressly charged in the bill that the effect of the enforcement of the ordinance will be to deprive the stock in the waterworks company of any earning ability, and thus complainant will be deprived of his property without compensation, and therefore without due process of law, and thereby complainant will be deprived of the equal protection of the law in express violation of the fourteenth amendment to the constitution of the United States. It is further averred in the bill that complainant is a citizen of the state of Massachusetts; that the waterworks company and the city of Cedar Rapids are corporations created under the laws of the state of Iowa; that the individual defendants—being the mayor and other city officials—are all citizens of Iowa; and that complainant owns 255 shares of stock in the waterworks company, of the par value of $11,250. The case is now before

[68] Part of the opinion is omitted.

the court upon an application for a preliminary writ of injunction to restrain the publication and putting in force the proposed ordinance until the validity thereof is heard and determined. The defendants named in the bill are the city of Cedar Rapids, the mayor, aldermen, and recorder of the city, and the waterworks company.

As the bill is framed for the purpose of invoking the protection of the provisions of the federal constitution, and as the matter involved exceeds $2,000 in amount, the case is one which falls within the jurisdiction of this court, irrespective of the citizenship of the parties in interest; but it is strongly urged on behalf of the city and its officials that this court ought not to take jurisdiction of the bill as framed, because the proceedings are instituted by a stockholder of the waterworks company to protect rights properly belonging to the company in its corporate capacity; that it appears that the company has already brought an action in the district court of Iowa for Linn county to restrain the enforcement of the ordinance; and that complainant has not complied with the requirements of equity rule 94, and therefore the bill should be dismissed. The purposes for which this rule was promulgated by the supreme court are clearly set forth in Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, it being therein stated that the rule is aimed at two evils,—one being the effort to invoke federal jurisdiction wrongly by using the name of a stockholder in cases wherein, if the suit was brought in the name of the corporation, jurisdiction in the federal tribunal would not exist; and the other to prevent a minority of the stockholders from controlling and dictating the action of the corporation in matters properly within the control of the directors as the representative of the whole body of the stockholders. In the case now before the court, as already stated, it is one within federal cognizance, irrespective of the citizenship of the parties, and therefore the provisions of rule 94 cannot be invoked on the ground that the suit is in the name of a stockholder, in order to confer jurisdiction on this court, which would not exist if the suit had been brought by the waterworks company. * * *

Upon the argument several questions were discussed which do not properly arise upon this application for a preliminary injunction, and which cannot be intelligently presented or considered until the facts are brought before the court. For the present, and upon the showing made in the bill, it must be held that complainant is entitled to the preliminary injunction prayed for, and it is therefore ordered that upon filing with the clerk a bond in the sum of $5,000 conditioned to pay all costs and damages that may be awarded defendants by reason of the issuance of the injunction, with sureties to be approved by the clerk of this court or his deputy at Cedar Rapids, a writ of preliminary injunction under the seal of the court shall be issued as prayed for in the bill herein filed.

VENNER v. GREAT NORTHERN RY. CO. et al.

(Circuit Court of the United States, 1907. 153 Fed. 408.)

In Equity. Demurrer to amended bill of complaint on the ground that on the complainant's own showing he is not entitled, in equity, to the relief demanded, or to any relief, as to any of the matters alleged or contained in such bill of complaint.

RAY, District Judge.[64] The complainant, Clarence H. Venner, is a citizen and a resident of the state of New York; defendant, Great Northern Railway Company, is a corporation organized and existing under the laws of the state of Minnesota; and defendant James J. Hill is a citizen and resident of said state of Minnesota. The amount involved, exclusive of interest and costs, is upwards of $2,000. The bill of complaint alleges, in substance, that in or about November, 1900, the defendant James J. Hill, then being a director in and the president of the Great Northern Railway Company, and in acting as such, and in violation of his trust and duty as such, and to the great damage and injury of said railway company and its stockholders, did certain acts, fully stated, which, if done, created a cause of action in equity which said Great Northern Railway Company might have maintained against said Hill. The bill of complaint then alleges that about March 6, 1907, the complainant, a stockholder in said corporation, made a demand upon it, its directors and president, that this or a like action be instituted against said James J. Hill for the relief demanded in this action, and that they neglected and refused to institute such action. The bill of complaint also alleges that complainant now is, and that "on and before the date of the demand," the demand just stated, the complainant was, the owner of 300 shares of the preferred capital stock of said corporation of the par value of $100 per share and of the present market value of about $100,000.

Complainant brings suit on behalf of himself and all others similarly situated, demanding that said Hill be required to account and pay over to the corporation for its benefit and the benefit, etc., of its creditors and stockholders. The bill of complaint contains no allegation or statement that the complainant was a stockholder or shareholder in the Great Northern Railway Company at the time of the transactions complained of, or that his shares have devolved upon him since that time by operation of law. There are no allegations from which we may legally even infer that such are the facts.

Hence the amended bill of complaint fails to comply with the ninety-fourth rule of equity practice (see 104 U. S. ix) promulgated January 23, 1882, and which provides: "Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted

[64] A part of the opinion is omitted.

by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

This action was commenced in the Supreme Court of the state of New York, and removed thence to the Circuit Court of the United States. A motion to remand was denied. A motion that complainant replead was granted, and complainant did replead, but has failed to strictly comply with the order in the respect named. However, a failure to comply with that order in such respect is not ground of demurrer. The question is: Does the amended bill of complaint state facts which in the Circuit Court of the United States entitle complainant to any relief in equity, or which entitle him to maintain an action in equity against these defendants? The complainant contends that in the Supreme Court of the state of New York, where this action was originally commenced, it is unnecessary to allege or prove, in order to maintain the action on this state of facts, that complainant owned his shares at the time of the transactions of which he complains, or that they thereafter devolved upon him by operation of law; in other words, to show that he was then interested in the corporation, or that the title to shares of one who then was interested therein has devolved upon him by operation of law. He insists that, as he had a cause of action in equity in the courts of the state of New York, when and where he brought his action, he has the same equitable cause of action in the Circuit Court of the United States, and that it may here be made out and sustained upon the same allegations and proof as are sufficient there. In short, he contends that equity rule 94, above quoted, has no application to a suit in equity removed to this court from a state court. * * *

It seems that in New York state its courts give equitable relief to a plaintiff, shareholder, who sues in behalf of himself and all others similarly situated to enforce a cause of action like this, which the corporation itself might enforce for its own benefit, and consequently for the benefit of its shareholders, but will not, even if such plaintiff had no interest in the corporation or in the enforcement of the cause of action at the time the wrong complained of was committed and his present interest has not devolved upon him by operation of law since. * * *

It must be regarded as settled law in the courts of the United States that a shareholder or stockholder in a corporation cannot maintain an action in equity of the description pointed out in equity rule 94, before quoted, unless he was a shareholder at the time of the transactions of which he complains, or his shares or share have since devolved upon him by operation of law. To give the courts of the United States equitable jurisdiction, the right to give equitable relief, this fact must be pleaded and proved. If the fact does not exist, then the courts of the United States have no equitable jurisdiction of the case; that is, they will not exercise their general equitable powers and jurisdiction. Unless that fact appears, it is not a case cognizable in equity in the courts of the United States, whatever may be the rules of equity or of equity jurisdiction in the several states, or in any one of them. * * *

By Act March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), original jurisdiction was conferred on the Circuit Courts of the United States in controversies between citizens of different states when the matter in dispute exceeded $500, but limited the jurisdiction of such Circuit Court as follows: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange."

Section 2 of the same act authorized the removal of causes between citizens of different states involving that amount from the state court to the Circuit Court, but did not impose the above restriction as to assignees and assignments.

It has been twice held by the Supreme Court of the United States that the limitation on the jurisdiction of the Circuit Court imposed by the first section has no application to suits commenced in the state courts and removed to the United States Circuit Court, and that such suits could be removed and maintained provided the laws of the state from the courts of which the removal took place recognized and sustained the cause of action. Delaware County Commissioners v. Diebold, 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674; Claflin et al. v. Commonwealth Ins. Co., 110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76. See, also, language of Mr. Justice Clifford in City of Lexington v. Butler, 14 Wall. 282, 20 L. Ed. 809, and Bushnell v. Kennedy, 9 Wall. 387, 19 L. Ed. 736.

These cases would seem to hold that, notwithstanding an express special limitation on the jurisdiction of the Circuit Court as to actions commenced therein, such limitation has no application to a suit commenced in a state court and removed to the Circuit Court; there being, of course, the necessary diversity of citizenship and amount in controversy to bring the case within the general jurisdiction of

the Circuit Court. But this limitation on the right of a plaintiff to bring his suit in the Circuit Court is not necessarily a declaration that he has no cause of action, legal or equitable. In the first instance, it denies to that court the right to exercise jurisdiction of the case. It excepts out of the general jurisdiction conferred of a certain class of cases special cases otherwise within it. On the other hand, equity rule 94 and the cases cited seem to hold that a shareholder in a corporation has no cause of action in equity in a case like this, anywhere, unless he held his shares at the time of the transactions complained of, or they have devolved upon him by operation of law since.

Jurisdiction of parties and of the subject-matter in controversy, and to determine whether a cause of action exists, is one thing, but equitable jurisdiction is quite another. Thus, the Circuit Court has jurisdiction of a controversy between parties residing in different states, if the amount involved, exclusive of interest and costs, exceeds $2,000. The jurisdiction to hear and determine this controversy is expressly conferred. So jurisdiction to hear and determine actions of ejectment may be expressly conferred on the Supreme Court of a state, and not on its county courts. In such case the county court has no jurisdiction of such a case. Equitable jurisdiction resides in the Circuit Court as a general proposition and a general power; but whether or not, in a given case, that court has "equitable jurisdiction," depends upon whether or not on general equitable principles, as established by the courts, the action in equity will lie. If not, there is no "equitable jurisdiction" of the particular case. Certain facts must exist, or there is no equitable jurisdiction of the particular case, while there is general equitable jurisdiction and power in the court. * * *

If A. sues B. for assault and battery, and asks equitable relief that B. be restrained from committing further assaults, no cause of action in equity is stated, or there is no "equitable jurisdiction" of the case, for the reason courts of equity do not grant such relief or any relief in such cases; but if A. sues B. for cutting down his orchard trees on his farm, and asks an injunction, the court of equity will grant the relief, if B. is doing the acts alleged, as here the case is within the equitable jurisdiction of the court. That is, in this class of cases, courts of equity, on well-established, equitable principles, grant such relief. In both cases the court has jurisdiction, but not equitable jurisdiction. In the first case it dismisses the cause for the reason the facts stated do not bring the case within the "equitable jurisdiction" of the court; that is, they do not make out a case where the court gives relief. In the class of cases of which this is one, the Supreme Court of the United States has held, in the cases cited, that equitable jurisdiction will not be exercised, equitable relief will not be given, unless the complainant avers and proves that he was a share-

holder in the corporation at the time of the transactions complained of, or that his shares have devolved upon him since by operation of law. That court has plainly and repeatedly said that, if such fact does not appear, no cause of action within the equitable jurisdiction of the United States court is stated. This being so, it seems to me immaterial how the case comes into that court.

Congress has provided that: "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." Act March, 1875, Rev. St. § 629, c. 137, cl. 1, as amended March 3, 1887, and corrected Aug. 13, 1888, 25 Stat. 433, c. 866 (U. S. Comp. St. 1901, p. 508).

The jurisdiction conferred in equity exists independently of state laws, and is similar to the equity jurisdiction of England. Allen v. Blunt, 1 Blatchf. 480, Fed. Cas. No. 215. While the Supreme Court of the United States may and must, when occasion demands, decide what civil cases are "at law" and what are "in equity," and in what cases equitable relief will be given, what cases are within the equitable jurisdiction and power of the court, it may not by rule or otherwise limit the jurisdiction of the Circuit Courts of the United States conferred by the acts of Congress, and say that a party litigant residing in one state may not bring his equitable action, if he has one, against a resident of another state, in the proper Circuit Court, and have it there decided. It may, however, as stated, say what cases are within the equitable jurisdiction of the court; in what cases and upon what state of facts that court may grant equitable relief. This is what the Supreme Court has done in this class of cases, and, it seems to me clear, that court has decided, repeatedly, that a complainant suing as a shareholder or stockholder has no cause of action in equity, in behalf of himself and others similarly situated, against a corporation and others, founded on rights which may properly be asserted by the corporation itself, if it would, unless he was such shareholder or stockholder in the corporation at the time of the transactions of which he complains, or such shares have devolved upon him since by operation of law.

This was decided by the Supreme Court before it promulgated rule 94. The rule was to emphasize the decision. The courts of the United States administer equity in accordance with the principles of equity jurisprudence as laid down and declared by the Supreme Court of the United States, and not as laid down and declared by the courts of the

several states, and if a citizen and a corporation of the state of Minnesota have committed some act or acts of which complaint is made (not against some statute of a state), and a citizen of some other state brings suit in equity asking equitable relief, and the case is one of which the acts of Congress referred to give the Circuit Court of the United States jurisdiction, it seems to me very clear that the rights of the parties must be determined according to the rules and principles of equity jurisprudence as determined and administered in the courts of the United States.

It is not a question of enforcing the provisions of some statute of a state conferring or defining some right, but one involving the application of the principles of the common law and of equity jurisprudence which are general throughout the United States, and in applying which the courts of the United States are not bound or governed by the decisions of the state courts, but by the decisions of the Supreme Court of the United States. See 2 Foster, Fed. Practice (3d Ed.) pp. 876, 877; New York, N. H. & H. R. Co. v. Cockcroft (C. C.) 49 Fed. 4, per Wheeler, J.

In Burgess v. Seligman, 107 U. S. 20–33, 2 Sup. Ct. 21, 27 L. Ed. 359, the court said: "The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state Constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is; but, where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence."

In Manhattan Life Ins. Co. v. Broughton, 109 U. S. at page 126, 3 Sup. Ct. at page 101 (27 L. Ed. 878), the court said: "The question involved was not a question of local law, but of general jurisprudence, upon which Mrs. Ferguson, and Broughton, as her trustee, had a right to seek the independent judgment of a federal court. Railroad Co. v. Lockwood, 17 Wall. 357, 368, 21 L. Ed. 627; Myrick v. Michigan Central Railroad, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 21, 27 L. Ed. 359."

It seems to me clear that the question here is one of general equity

jurisprudence, where the courts of the United States are to be governed by their own independent judgment, and where the Circuit Court should follow the decision of the Supreme Court of the United States as to what the law is.

In Myrick v. Michigan Central R. R. Co., 107 U. S. at page 109, 1 Sup. Ct. at page 425 (27 L. Ed. 325), the court said, in relation to a contract of carriage and in referring to the decisions of the Supreme Court of the state of Illinois: "Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law, upon which the decision of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment. Chicago City v. Robbins, 2 Black, 418, 17 L. Ed. 298; Railroad Company v. National Bank, 102 U. S. 14, 26 L. Ed. 61; Hough v. Railway Company, 100 U. S. 213, 25 L. Ed. 612."

It seems to me it would be a strange medley in the law, as administered by the courts of the United States, to hold in this class of cases, in administering equity, where no local law, or state statute, or state Constitution is involved, that a citizen of New York has a cause of action in equity against a Minnesota corporation and a citizen of that state cognizable and enforceable by the Circuit Court of the United States sitting in New York, if he commences his action in the state court, and it is removed to the United States Circuit Court, but that another citizen of the state of New York, on the same facts and equities, has no cause of action in equity cognizable and enforceable by the United States Circuit Court sitting in New York if such action is brought in that court in the first instance. This would make his right of action and right to relief depend, not on the facts of the case, but on the court in which he commenced his action. I do not think that is the law. Where a line of uniform decisions has been established by the highest court of a state, so they have become a local rule of property, and parties are presumed to contract with reference thereto, the courts of the United States should, and except in special cases and for special reasons do, follow them. Neves v. Scott, 13 How. 268, 271, 14 L. Ed. 140; Gaines v. Fuentes, 92 U. S. 10–20, 23 L. Ed. 524; Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006. But that is not this case.

In 2 Foster, Federal Prac. (3d Ed.) pp. 876, 877, it is said: "The Revised Statutes provide that 'the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' This rule applies to condemnation proceedings and to all civil proceedings in the federal courts, except equity and admiralty cases, although they are not strictly according to the common law."

In N. Y., N. H. & H. R. Co. v. Cockroft (C. C.) 49 Fed. 3, 4, Judge Wheeler said: "By section 721 of the Revised Statutes of the United

States, the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. This seems to govern all proceedings in court, except equity and admiralty cases, although they are not strictly according to the common law, and to be applicable here."

And I wish to emphasize two facts: First, I am not pointed to any decision of the Court of Appeals of the State of New York holding a doctrine contrary to that laid down in Hawes v. Oakland, supra; and, second, in Hawes v. Oakland the Supreme Court first decided the case and enunciated the equitable doctrine and rules applicable to such a case, and then immediately adopted and promulgated the rule in equity quoted to emphasize that decision. See Corbus v. Gold Mining Co., 187 U. S. 462, 23 Sup. Ct. 157, 47 L. Ed. 256. I think the rules laid down in that case are not local in their application, but general; that they constitute a general rule of equitable jurisprudence and equitable jurisdiction throughout the entire United States, and govern all like cases tried in the Circuit Court of the United States, whether instituted there or removed thereto from a state court. In giving equitable relief in such cases, the holdings of the Circuit Courts of the United States should be uniform, and all shareholders in corporations should stand on an equality therein. Many state courts, as those of New York, hold that a plaintiff in a negligence action must allege and prove absence of contributory negligence. In the United States Circuit Court contributory negligence is an affirmative defense, and must be alleged and proved. This is the rule where the case is removed from the state court to the circuit court. R. R. Co. v. Gladmon, 15 Wall. 401, 21 L. Ed. 114; I. & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; N. Pac. R. Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296.

The demurrer must be sustained; but defendant may answer within 30 days after being served with a copy of the order to be entered pursuant hereto.

DELAWARE & H. CO. v. ALBANY & S. R. CO.

(Supreme Court of the United States, 1909. 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862.)

McKENNA, J. The certificate of the court is as follows:

"This cause comes here upon appeal from a final decree of the circuit court, southern district of New York, which directs that the defendant, Delaware & Hudson Company (hereinafter called the Delaware Company) pay to the defendant the Albany & Susquehanna Railroad Company (hereinafter called the Susquehanna Company) the amount of $1,107,923.24.

"The case was fully argued and submitted on briefs. It thereupon developed that there was a question presented whether the bill could be maintained under the 94th equity rule. That question is a preliminary one, it has been held to be jurisdictional in character. Chicago v. Mills, 204 U. S. 321, 51 L. Ed. 504, 27 Sup. Ct. 286; Doctor v. Harrington, 196 U. S. 579, 49 L. Ed. 606, 25 Sup. Ct. 355), and this court desires the instruction of the Supreme Court for its proper decision.

"Statement of Facts.

"The facts upon which the question arises are as follows:

"The defendant corporations are both citizens of the state of New York; the complainants are citizens of the states of Connecticut and Rhode Island. The bill was brought to obtain an accounting for various sums of money which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental or in the nature of rental under a lease made in 1870. For the convenience of all, a copy of the pleadings is hereto annexed, marked Exhibit 'A,' which may be referred to for a more detailed statement of the cause of action. The bill does not 'set forth with particularity the efforts of the plaintiffs to secure such action as they desire on the part of the managing directors or trustees.' Nor did the proofs show any such efforts. Nor does the bill set forth any efforts to secure 'such action on the part of the shareholders.' Nor did the proofs show any such efforts. Nor did the bill set forth, or the proof show, 'the causes of their failure to obtain such action' otherwise than is hereinafter disclosed.

"The complaint was filed on June 12, 1906. The Susquehanna Company was organized under the act of April 2, 1850, which provides that 'there shall be a board of thirteen directors * * * to manage its affairs,' and for many years before this suit was brought a majority of the board of directors of the Susquehanna Company consisted of persons who were officers, directors, or employés of the Delaware Company. At the time this suit was instituted the directors and officers of the Susquehanna Company, the dates of their election as such, and their relations to the Delaware Company, with dates of election, were as shown on the following statement:[65] * * *

"Of these, Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver, and Robert C. Pruyn, at the time this suit was begun, did not own or hold, in their own right, any shares of stock in the Susquehanna Company, but shares of stock of that company owned by the Delaware Company were transferred to each of them on the books of the Susquehanna Company by the Delaware Company for the purpose of qualifying them as such directors. Charles A. Walker owned five shares of Susquehanna stock from 1901

[65] The names of the directors of the Susquehanna Company are omitted. They were, apparently without exception, officers or nominees of the Delaware Company.

to 1906; it does not appear that he owned any stock in the Susquehanna Company during the year 1906.

"So far as appears from anything shown in this record, none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity, the payment of which was to be resisted.

"On June 12, 1906, and for thirty years prior thereto, the capital stock of the Susquehanna Company had been fixed at and limited to 35,000 shares. Of this capital stock on June 12, 1906, the Delaware Company owned 4,500 shares and its directors or officers owned or controlled 4,340 shares; the complainants owned 1,312 shares, and a so-called 'protective committee' who, from and after December, 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill, controlled 6,688 shares. The entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in the state of New York.

"An annual meeting of the Susquehanna Company was held subsequent to the beginning of this suit, on October 16, 1906. At that meeting the nominees of the protective committee were elected, receiving 15,501 ballots, the nominees of the former management receiving 15,441 ballots. About two weeks before such annual meeting the Susquehanna Company, being then controlled by the directorate above named, filed a demurrer to the bill, which is hereto annexed as Exhibit 'B.' Copies of such demurrer were sent by stockholders opposed to the existing control to all stockholders, and thereafter and before the meeting proxies for several thousand shares were received by the persons who voted for the nominees then elected.

"Questions Certified.

"Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court are:

"First. 'Does the fact that, before institution of this suit, complainants made no demand for relief upon the board of directors of the Susquehanna Company, prevent them from maintaining this bill?'

"Second. 'Does the fact that, before institution of this suit, complainants made no effort to obtain relief at a stockholders' meeting, prevent them from maintaining this bill?' "

The questions in connection with the 94th equity rule present the issue in the case. The rule is as follows:

"94. Every bill brought by one or more stockholders in a corporation against the corporation and other parties, formed upon rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the complainant was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not have otherwise

cognizance. *It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.*"

Do the facts show a compliance with the rule, or rather that part of it which we have expressed in italics? The other parts of it are not involved.

It is the contention of appellant that the averments in the bill, as exhibited in the certificate, do not satisfy either the language of the rule or its substance. The argument is that (1) a shareholder, as a condition of his suit, must show that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances; that his efforts must be earnest, not simulated, and this must be made apparent to the court; (2) his failure to apply to the managing body of the corporation will not, in the absence of fraud, be excused by the fact that such managing body are also officers, directors, or employés of the corporation against which the suit is brought; (3) if the facts of this case excused from a preliminary demand upon the directors, the complainants were required to show "that they could not have secured appropriate action by an appeal to the stockholders of the Susquehanna Company." The appellees counter these contentions by asserting that (1) the case is not within the requirements of rule 94. "The bill shows, under oath," it is said, "that the directors were hostile, and that demands upon them would be 'idle and nugatory.' * * *" (2) Complainants (appellees here) were not required to appeal to the stockholders of the Susquehanna Company because (a) the stockholders, under the charter of the company, could not grant relief; (b) even if such power existed, the stockholders "could not oust directors from office before expiration of their terms." And it is further contended that, at the time the suit was instituted, "the Delaware Company controlled the stock vote of the Susquehanna Company."

These opposing contentions present a not unusual case where the rule or principle of law is clear enough, but its application to a particular case is not so clear, and there is a contest of plausible constructions between which it is not always easy to decide. The purpose of rule No. 94 hardly needs explanation. It is intended to secure the Federal courts from imposition upon their jurisdiction, and recognizes the right of the corporate directory to corporate control; in other words, to make the corporation paramount, even when its rights are to be protected or sought through litigation. Cases in this court have indicated such right. But the directory may be derelict and the interests of stockholders put in peril, and a case hence arises in which the right of protecting the corporation accrues to them. Rule 94 expresses primarily the conditions which must precede the exercise of such right, but emergencies may arise in which the antagonism between the directory and the corporate interest may be unmistakable,

and the requirements of the rule may be dispensed with; or, it is more accurate to say, do not apply. There are cases which illustrate these contingencies.

As a typical case of the first kind, that is, which enforces the doctrine that the rights of the corporation must be asserted through the corporation, Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. Ed. 827, is cited. In that case Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401, was declared to be the leading case on the subject in this country, and, examining the latter case, it was said that it did not establish, nor was it intended to establish, a doctrine different in any material respect from that found in the other American cases and the English cases. And the doctrine was said to be that, to enable a stockholder in a corporation to sustain in a court of equity a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as a foundation for the suit some action or threatened action of the managing board of directors which is beyond their authority; a fraudulent transaction, completed or contemplated, which will result in serious injury to the corporation or stockholders; where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself or of the rights of other stockholders; or where a majority of the stockholders themselves are oppressively and illegally pursuing a course inimical to the corporation or to the rights of the other stockholders. The court expressed the possibility that other cases might arise, but said "the foregoing may be regarded as an outline of the principles which govern this class of cases."

Determined by the principles enumerated, the court affirmed a decree sustaining a demurrer to a bill by a stockholder of the Contra Costa Waterworks Company, filed in behalf of himself and other stockholders against the company, its directors and the city of Oakland, to enjoin the city from taking, and the directors from permitting it to take, water from the works of the company without compensation. The bill alleged a request of the directors to take proceedings, and that they declined to do so. The bill also alleged injury to the corporation, diminution of dividends of the complainant and other stockholders, and a decrease of the value of their stock. Appellant adduces, as repeating and illustrating the doctrine of Hawes v. Oakland, the following cases: Dimpfel v. Ohio & M. R. Co., 110 U. S. 209, 28 L. Ed. 121, 3 Sup. Ct. 573; Quincy v. Steel, 120 U. S. 241, 30 L. Ed. 624, 7 Sup. Ct. 520; Taylor v. Holmes, 127 U. S. 489, 32 L. Ed. 179, 8 Sup. Ct. 1192; Corbus v. Alaska Treadwell Gold Min. Co., 187 U. S. 455, 47 L. Ed. 256, 23 Sup. Ct. 157.

The latter case is quoted by appellant as putting unmistakable emphasis on rule 94, and that the facts of the case at bar do not satisfy its requirements. The object of the suit was to enjoin the board of directors of the corporation from paying a license tax levied upon the cor-

poration under the provisions of an act of Congress. Corbus, the complainant in the suit, was a stockholder of the corporation, and alleged, as the reason of the suit by him, that he was unable to request the directors of the company to refuse to pay the tax or apply for the license required by reason of their great distance from him; but that he had made such request of the officers of the company residing in Alaska, and that they had refused to comply with the request. Of this allegation the court said that it showed no compliance with rule 94, and that complainant simply relied on the distance of the directors from where he resided as an excuse for not applying to them. "We are of opinion," it was said, "that the excuse is not sufficient. He should, at least, have shown some effort. If he had made an effort and obtained no satisfactory result, either by reason of the distance of the directors or by their dilatoriness or unwillingness to act, a different case would have been presented; but to do nothing is not sufficient."

A case sustaining the second proposition which we have mentioned, to wit, where the circumstances take the case out of the rule, is Doctor v. Harrington, 196 U. S. 579, 49 L. Ed. 606, 25 Sup. Ct. 355. The suit was brought by Doctor and others as stockholders of a corporation called the Sal Sayles Company to set aside a judgment obtained by the Harringtons against that company. The bill alleged that the suit was not collusive; that complainants were unable to obtain redress from the company or "at the hands" of its stockholders. It further alleged that the board of directors of the corporation was "under the absolute control and domination of the defendant, John J. Harrington, and that said Harrington, by reason of having the possession of a majority of the capital stock of said corporation," likewise controlled "the action of the stockholders." It was further alleged that he refused to give any information with regard thereto, and declined to redress the wrongs of which complaint was made, or give complainants any opportunity to lay before the board of directors or the stockholders of the company the facts set forth.

It will be observed, therefore, that there was no compliance with the requirements of rule 94, as expressed in its letter. The efforts that were made to secure the action of the managing directors or trustees were not "set forth with particularity." Nothing was alleged but the domination of John J. Harrington and his control of the directors. What he did, in what way he exerted control, was not alleged. In other words, the bill seemed to show a case, not of compliance with the requirements of rule 94, but circumstances which excused from such compliance.

Coming to consider the effect of those allegations, we said that rule 94 contemplates that there may be, and provides for, a suit by the stockholder in a corporation, founded on rights which may be properly asserted by the corporation. And we further said that "the ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a

control antagonistic to him, and made to act in any way detrimental to his interest. In other words, his interests and the interests of the corporation may be subservient to some illegal purpose." And we decided that these principles were satisfied by the allegations of the bill, and that such antagonism existed between the complainants in the suit and the directors of the corporation that they would "suffer irremediable loss if not permitted to sue." In other words, the complainants were in such a situation by reason of the power which Harrington possessed over those who managed the corporation—directors and stockholders—that appeals to them for action would have been futile. Prior cases were considered, including Dodge v. Woolsey and Hawes v. Oakland, and the conclusion reached was pronounced to be in accordance with their doctrine.

Do the facts in the case at bar present the same situation that was passed on in Doctor v. Harrington? The certificate shows the following facts: The complaint was filed June 12, 1906. The suit was brought to obtain an accounting for various sums of money, which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental, or in the nature of rental, under a lease made in 1870. The Susquehanna Company was organized in 1850, and, under the law, its board of directors consisted of thirteen members, a majority of whom for many years before this suit was brought were also "officers, directors, or employés of the Delaware Company." Indeed, they served as its president, vice president, treasurer, secretary, directors, and general counsel,—officers of dominating influence, it must be said. It appears that certain of the persons occupying those offices did not, at the time the suit was brought, own or hold, in their own right, any shares of stock in the Susquehanna Company, but shares of stock in that company owned by the Delaware Company were transferred to each of them on the books of the former company by the latter company for the purpose of qualifying them as directors. The number of shares of the capital stock of the Susquehanna Company, and how held or owned, and the attitude of the owners thereof to the Delaware Company, appear in the certificate and need not be repeated.

The certificate recites the following: "So far as appears from anything shown in the record, none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity, the payment of which was to be resisted."

The situation was unique. The company whose interest it was to assert the right to payment and to demand it was under the control or could be influenced by the company whose interest it was to deny indebtedness and resist payment. And though there are allegations in the bill of contrary import, the good faith of the directors need not be questioned. They might, notwithstanding, be firm in their views,—firm to resist appeals against them. Their views seemed to persist

through many years. At any rate, a situation was presented fully as formidable to the interest of stockholders in the Susquehanna Company as that presented in the Harrington Case. And it may be well doubted whether the directors of the Susquehanna Company, so being directors of the Delaware Company, and who, either from an apathy that endured through many years, could discern no right in that company to assert, or, through conviction of the absence of right, were not the best agents to begin or conduct a litigation of such right. It was certainly natural enough that a stockholder should seek more earnest representatives, and consider that the directors "occupied," to use the language of Dodge v. Woolsey, "antagonistic grounds in respect to the controversy" as to him. The attitude of the directors need not be sinister. It may be sincere. It was so in Chicago v. Mills, 204 U. S. 321, 51 L. Ed. 504, 27 Sup. Ct. 286, and Ex parte Young, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. 441, 14 Ann. Cas. 764; and other cases. In this case it was certainly determined. It continued until after this suit was brought. Both the Delaware Company and the Susquehanna Company, then under "the administration of the Delaware Company," to quote from the circuit court of appeals, demurred to the bill.

But it is contended that efforts should have been made and alleged to move the corporation to action through a stockholders' meeting. In this contention there is again similarity to the Harrington Case. It was there alleged that Harrington controlled the action of the stockholders "by reason of having possession of a majority" of the capital stock of the corporation. The control in the case at bar, therefore, may not have been as direct as in Doctor v. Harrington, but it was practically efficient. The stock of the Susquehanna Company consisted of 35,000 shares, of which the Delaware Company and its directors and officers held 8,840. The complainant and a so-called protective committee, a committee which, the certificate states, "from and after December, 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill," controlled 8,000 shares. The certificate also states that the "entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in New York."

The proposition then is, that notwithstanding the power of 8,840 shares, held by the managers of both corporations, against 8,000 held by complainants and the protective committee, complainants were required by rule 94 to engage and organize all other stockholders, or enough of them to direct or change the corporate management; in other words, struggle for the control of the corporation with an adverse board of directors. And such struggle, appellant contends, "could not be regarded as presumptively futile," as there would be an appeal to "the self-interest of the remaining stockholders;" and, it is pointed out, that the certificate recites that control through the stockholders was subsequently obtained. But it was obtained after the suit

was begun and the antagonism of the directors was more clearly exhibited. The circumstances of this case preclude, therefore, an acceptance of appellant's proposition. Rule 94 is intended to have practical operation, and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases. Therefore, considering that this case, by reason of its facts, falls within the principle of Doctor v. Harrington, we do not review the cases cited by appellees, wherein, it is contended, suits were justified by demand on the directors alone, nor consider whether stockholders have the power to compel directors to institute suits to which the directors are opposed.

We answer both questions certified in the negative.

SECTION 4.—TRANSFER OF STOCK

DENTON et al. v. LIVINGSTON.

(Supreme Court of New York, 1812. 9 Johns. 96, 6 Am. Dec. 264.)

This was an action of assumpsit. Besides the usual money counts, the declaration contained two special counts: 1. That the defendant, on the 20th June, 1811, being indebted to the plaintiffs in 1,000 dollars, for so much money by the defendant before that time collected and received on a writ of venditioni exponas, issued out of this court and directed to, and received by, the defendant, as sheriff of the county of Columbia, at the suit of the plaintiffs, against the goods, &c. of one Samuel Edmonds, &c. for 631 dollars and 12 cents, damages and costs, &c. and being so indebted, the defendant, in consideration thereof, &c. undertook &c. 2. Whereas the defendant, late sheriff, &c. by virtue of another venditioni exponas, to him directed commanding him to levy the sum of 631 dollars and 12 cents, of the goods and chattels of Samuel Edmonds, &c. the defendant, then being sheriff, &c. by virtue of the said venditioni exponas, the said goods and chattels of the said Samuel Edmonds, found in his bailiwick, sold at public auction or vendue; and that divers goods and chattels of the said Edmonds, so exposed for sale, were purchased by W. A. he being the highest bidder for the same, for a large sum of money, to wit, a sum which, together with the moneys before collected on the venditioni exponas, by the defendant, were sufficient to pay and satisfy the money directed to be levied by the said venditioni exponas, together with the fees of the defendant, as sheriff, and were delivered to the said W. A. to his satisfaction; yet the defendant has not paid to the plaintiffs the sum of money so directed to be levied, &c. or any part thereof, although, &c.

The defendant pleaded non assumpsit, with notice.

The cause was tried at the Columbia circuit, before Mr. Justice Yates.

An exemplification of the judgment at the suit of the plaintiffs against Edmonds, and a test. fieri facias was produced, on which the defendant had endorsed a return, as follows: "By virtue of the within writ of test. fi. fa. I have taken goods and chattels of the within named Samuel Edmonds, to the value of the damages within mentioned, which goods and chattels remain in my hands unsold, for want of buyers," &c.

The venditioni exponas under which the sale was made was also produced. The plaintiffs also proved that the amount of the sales was sufficient to satisfy their execution, and that the sale was for immediate payment.

The defendant proved, that among the goods, and chattels sold was a sloop which sold for 275 dollars, a share in the Bank of Columbia, which sold for 50 dollars, and three shares in the Hudson library, which sold for 9 dollars; that at the time of the sale the sloop was at Poughkeepsie, and Ashley, the purchaser, afterwards refused to pay for her, on the ground that the defendant had not delivered to him the possession of the sloop; and she was afterwards sold on another execution against Edmonds, by the sheriff of Dutchess county, which execution issued subsequent to the levy under the execution of the plaintiffs. The defendant contended that the shares were not liable to be sold on execution, and that the defendant was not liable for them, Ashley having refused to pay for them.

The plaintiffs proved, that when the levy was made on the sloop she lay at Hudson, in the county of Columbia, and Ashley gave a receipt for her to the sheriff, who, at the time of the sale, stated that she was receipted by a responsible person; and she was struck off to Ashley, as the highest bidder.

The judge charged the jury, that the plaintiffs were not entitled to recover for the shares, as they were not the subject of sale, nor for the amount at which the sloop sold, as it did not appear that the defendant had ever received the money; and that the jury must find for the plaintiffs the balance, after deducting those items. The jury accordingly found a verdict for the plaintiffs, for 95 dollars.

KENT, C. J.[66] It is not a question, upon the present motion, whether the last count stated in the case was properly joined with the other counts. The first special count stated, is upon an implied assumpsit to pay the amount of moneys collected and received upon the writ of venditioni exponas, and the point is, how far the evidence supports the count. * * * In the present case the counsel for the plaintiffs do not appear to have contended, at the trial, for the value of the goods as returned to the fi. fa. but to have equitably referred the case to the fact of the amount of the sales. If the sheriff conducts himself throughout the business with diligence and fidelity, this is certainly the more just rule, and the judgment ought not to be considered as any

[66] Part only of the opinion is given.

further satisfied, as against the original defendant, than the amount of the proceeds of such sale; for it may often happen that the property seized and returned as of the value of the debt may be found not to belong to the defendant, or may be found to be of much less value, by the fall of the market between the levy and the sale, or by means of some concealed defect or infirmity. We shall, therefore, waive the further consideration of this point, and proceed as the plaintiffs did at the trial, to consider the actual sum for which the sheriff ought to account upon the sale, as made and proved.

1. He is answerable for the amount of the sale of the sloop, and his excuse for not returning the money is insufficient. Instead of retaining the sloop in his possession between the levy and the sale, he delivered her to Ashley, the purchaser; and as he afterwards sold her to him, and has lost the possession, he is answerable for the money she sold for. There is no other remedy for the plaintiffs. They cannot call upon the original defendant for the amount of this sloop, for he would plead this seizure by the sheriff in bar; and if the sheriff, by such means as the delivery and subsequent sale of the chattel, without the money, could avoid answering for the amount, there would be no certainty and safety to the creditor, by the process of execution.

2. But the bank and library shares were levied on by mistake, for these were mere choses in action, and not the subject of a levy and sale by fi. fa. any more than bonds and notes; and such things cannot be taken in execution. Francis v. Nash, 7 Geo. II. K. B. cited in Com. Dig. tit. Execution, c. 4.

As, therefore, the charge of the judge was incorrect in ruling that the defendant was not answerable for the amount of the sale of the sloop, there must be a new trial, with costs to abide the event. Rule granted.

FOSTER v. POTTER.

(Supreme Court of Missouri, 1866. 37 Mo. 525.)

HOLMES, Judge. This is a petition in the nature of a bill in equity to compel the parties defendant to interplead and establish their rights to a fund held by the plaintiff, and which he is ready to pay over to the party entitled to it. It appears that the firm of J. & W. McDowell, owners of certain shares of stock in the Pacific Insurance Company (of which John McDowell afterwards became sole owner), gave to the plaintiff, as trustee for the benefit of the corporation, a deed of trust in the nature of a mortgage upon this stock, to secure the payment of certain notes held by the company. The deed was duly executed and recorded, and the transfer was entered on the books of the company, and signed by the grantors. Afterwards, the defendant Potter caused an attachment to be levied upon these shares of stock

as the property of McDowell, and other attachments followed. The manner of the levy does not appear; but judgments were obtained in the attachment suits, and executions were issued thereon, under which this stock was levied upon and sold by the sheriff, in pursuance of the act concerning executions, as the property of McDowell, the defendant therein, Potter becoming the purchaser; and an instrument in writing was executed and delivered to him by the sheriff, as provided by the statute, purporting to convey all the interest of McDowell in these shares of stock. Subsequently to these proceedings, and when the notes became due, there was a sale by the trustee under the deed of trust, which realized a balance, over and above the debt secured, amounting to $1,644.46, which sum remained in the hands of the trustee. Some time after this, the trustee (the plaintiff here) was garnished as the debtor of McDowell, under an execution issued upon a judgment in favor of John Lyon and others against him; and while proceedings in the matter of the garnishment were still pending, this suit was commenced against all the parties concerned. The court below ordered the fund to be paid to John Lyon and others, and Potter was decreed to pay the costs of the suit. Potter appeals to this court.

The court below refused to instruct the jury for the defendant Potter, to the effect, that the levy of the attachment (in the manner provided in the act concerning executions) created a lien upon the balance of the proceeds of the trustee's sale after payment of the notes secured, and that the levy and sale to Potter, under the executions issued in the attachment suits, gave him a good title to the fund remaining in the hands of the trustee; and further, that the equity of redemption in the shares of stock was subject to levy and sale in the same manner as the shares themselves would have been, if they had been standing in the name of the defendant without any encumbrance thereon.

The statute subjects shares of stock in incorporated companies to levy and sale under execution, and prescribes the manner in which the thing may be done; but there are no such provisions in the act concerning attachments. At common law, such property could not be the subject of attachment or execution. This principle has been recognized by this court, and applied to a levy under execution upon an equity of redemption in movable personal chattels, where the mortgagor retained nothing more than a permissive possession, determinable at the will of the mortgagee, or upon an equitable interest in personal property assigned; and it has been held that such mere equitable interests could not be reached by process of law, nor be bound by execution, and that no title or interest in the chattels could pass to the purchaser under such levy and sale, even where the chattels were actually seized by the officer and delivered to the purchaser. King v. Bailey, 8 Mo. 332; Yeldell v. Stemmons, 15 Mo. 443; Boyce v.

Smith, 16 Mo. 317. The defendant in the execution having no property in the thing, but a bare possession only, no interest could pass to the purchaser; and a mere right of redemption could not be actually seized. An attachment creates a lien upon property that can be attached and seized, or garnished; and a sale under execution, in such case, will be effectual to pass the property levied on, where such lien exists. It is not made to appear in what manner this attachment was undertaken to be levied on these shares of stock. The statute provisions, authorizing a levy of an execution, did not therefore authorize the levy of an attachment also.

In general, stock owned by an individual in a corporation cannot be subjected to the payment of his debts by the process of attachment, nor by garnishee process, served on the corporation. Such property is neither a specific chattel, nor a debt, but a mere chose in action. A certificate of stock is merely an evidence of an interest or property owned in the corporation, but not of a debt due as a liquidated money demand. Planters' Bank v. Leavens, 4 Ala. 753; Titcomb v. Union Marine & Fire Ins. Co., 8 Mass. 326. It does not appear that any certificate was actually seized. The property interest of the shareholder is an intangible and invisible thing, and cannot be actually seized by the officer. There can be no change of possession; and the sale of such interests under execution or attachment was a mode of transfer unknown to the common law. Ang. Corp. § 588. The attachment act provides no method by which a levy can be made. It is clear, therefore, no levy of this attachment could have been made that would be valid and effectual as such.

The statutes of some States make special provision for the levy of an attachment upon such shares of stock. Our statute authorizes a levy upon books, accounts, notes, bonds, certificates of deposit, evidences of debt, and real and personal property; and provides that when such things are to be attached, the officer shall take the same and keep them in his custody, if accessible; and if not accessible, he may summon the person in whose possession they are, if in their nature seizable at all, as a garnishee. Neither shares nor certificates of stock in a corporation come under any one of these specifications otherwise than as chattels, or personal property. A certificate, as a chose in action and a chattel, might be seized, but stock, as personal property, could not be seized. It would seem to be very clear, that this kind of property is by its very nature wholly inaccessible to actual seizure by an officer He could not take it into his custody. Nor can the corporation be said to have possession of it, as an article of property belonging to the defendant, in such manner that the corporation could be summoned as a garnishee. A garnishee may discharge himself by paying the debt into court, or delivering up articles of property in his possession as a garnishee, to the officer, to be disposed of under the order of the court Nothing of this kind could be done here. We must conclude that the

statute has not changed the common law rule in relation to the levy of an attachment upon shares of stock.

But the act concerning executions does provide a specific mode in which shares of stock in incorporated companies may be levied upon and sold under execution; and an execution upon a general judgment in an attachment suit is to be a common law fi. fa., and may be levied upon all the property of the defendant (subject to execution), whether attached or not. R. C. 1855, p. 256, § 61. It would appear that these shares were levied upon under executions issued upon general judgments, and sold and conveyed to the defendant Potter, in pursuance of the statute. If the defendant had been the absolute owner of the shares at the time of the levy, there could have been no doubt that the purchaser would acquire a good title by his purchase at the sheriff's sale. The statute provides, that when an execution is issued against a person, "being the owner of any shares or stock" in any corporation, it shall be the duty of the secretary, or other officer, to furnish to the levying officer a certificate of the number of shares held by the defendant, "with the encumbrance thereon" (section 23); that the levy shall be made by leaving a copy of the writ with the secretary or other officer, with a certificate attested by the officer making the levy, that he levies and takes such shares to satisfy his execution (section 24); and that when such shares are sold, the officer shall execute and deliver to the purchaser an instrument in writing (a bill of sale) conveying the same, and leave with the secretary a copy of his execution and of his return thereon, and thereupon the purchaser is to become entitled to the dividends and stocks and all the privileges in the corporation which the debtor himself had (section 55). It is also provided that such shares may be claimed, when levied upon, by any other person claiming an interest or title to the same, as in other like cases.

Here is an effectual mode of levy, sale and transfer of all the interest of the debtor defendant, without an actual seizure, or anything like a delivery of the property in specie. The purchaser is put into the place of the debtor. The prior rights of the mortgagee are not necessarily interfered with. He may still proceed to sell under his mortgage, or he may claim the property before the sheriff, or he may assert his rights in any other way known to the law. His conveyance upon a sale under his power may be effectual to pass the whole property in the stock, notwithstanding the sale under execution. The purchaser takes the property subject to the deed of trust. It does not appear that the notes had become due before the levy and sale under the executions. The deed itself provides that the trustee may sell, after the notes become due, whenever the holders of the notes shall require payment. Under such a deed, the absolute ownership does not vest in the trustee until a forfeiture, or even until an actual sale

shall pass the title and interest in the property to the purchaser. He has a conditional legal title, with a power to sell and pass the title or absolute ownership to the purchaser. He can no more have an actual possession, or make a seizure or delivery of possession of the specific property, than the sheriff. Whatever possession or control the mortgagor could exercise over such property still remain with him as before, and was to continue until the trustee should be required to sell. He has thus an equity of redemption, with the possession and control of the property, according to its nature, for a definite period of time. In short, he remained the owner of the stock, subject only to the encumbrance. This encumbrance was noted on the books of the corporation in such manner that the secretary could furnish the levying officer with the certificate required by the statute. The amount of the defendant's interest could thereby be definitely ascertained and rendered certain. The words of the act are not necessarily confined to such claims as the corporation itself may have on the stock for unpaid assessments or otherwise; they are broad enough to include any and all encumbrances.

The decisions heretofore made, as above, related to movable articles of personal property, which may admit of seizure, change of possession, and actual delivery; they contemplate a case where the mortgagor has no right to retain possession of the property for any definite period. In King v. Bailey it was said that the bare possession of a chattel by the mortgagor with the permission of the mortgagee, and determinable at his will could not be the subject of sale under execution; that such bare possession gave no such interest in the property as could be levied on; but that it was not intended to convey the idea that a certain and determined interest in chattels, accompanied with possession, however limited, could not be sold under execution. The same intimation was repeated in the subsequent cases. The property consisted of slaves, lumber, and the like. It did not appear that the mortgagor had a right of possession for any definite period; nor did the property come under the same provisions of the statute as these shares of stock. The same distinction is clearly made in the authorities therein referred to. Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 283; Bailey v. Burton, 8 Wend. (N. Y.) 345. The former case concerned an indeterminate equitable interest in the surplus which might remain in the hands of the assignees after the purposes of the assignment were answered. In both cases it was expressly declared that the principle did not apply where the mortgagor had a right of possession for some definite period; but that where there was an equity of redemption, with such right of possession for a definite period, before the property could become forfeited and liable to be taken and sold by the mortgagee, the mortgagor has an interest which may be levied on and sold under execution, and that the purchaser would take

the property subject to the encumbrances. Mattison v. Baucus, 1 N. Y. 295. These cases related only to such articles of personal property as may be the subject of actual seizure and change of possession, and they proceed upon the idea that indefinite and uncertain interests are not to be sacrificed under the legal process in this manner, when there is a more suitable remedy in equity; they have no direct bearing upon a case of this kind.

In those States where the statutes authorize an attachment to be levied on shares of stock in corporations, under various provisions, it is held that a levy may be made upon the equity of redemption of the mortgagor in such shares, and a sale made subject to the mortgage, even when the mortgage is given to indemnify against uncertain liabilities other than for the payment of money. 2 Hill. Mortg. ch. 48. The purchaser under the execution may pay off the prior mortgage, and he will thereby become the absolute owner of the shares. Forbes v. Parker, 16 Pick. (Mass.) 462. The surplus arising from the sale of such equity of redemption under an execution is to be held by the officer and paid over to the next in order of priority. Denny v. Hamilton, 16 Mass. 402.

At the time of this levy and sale under execution we think the defendant had an equity of redemption, with a right of possession and control for a definite period, and such an ownership and property in this stock as could properly be levied on under the statute relating to executions, subject to the existing encumbrances; and that the sale and conveyance by the sheriff passed to the purchaser the property in these shares, subject only to the prior deed of trust. When the property was sold under the deed of trust for the payment of the notes secured, the surplus remaining over became subject in his hands to a trust for the benefit of the party next entitled thereto. And the purchaser under these executions having acquired the equity of redemption, by the bill of sale from the sheriff, became substituted thereby to the right and place of the mortgagor, and entitled in equity to receive that surplus in his stead. It follows, that at the date of this garnishment of Lyon and others, the trustee was not indebted to the defendant in the execution under which he was summoned as garnishee, but stood indebted or at least accountable in equity to the purchaser under the first execution.

This being a proceeding in equity, we see no difficulty in the way of a decree in favor of the defendant Potter, as the party in equity entitled to the funds.

The first instruction refused for the defendant was not entirely correct. The levy of the attachment was unauthorized and void, and gave no lien; but the levy and sale under the execution issued in the attachment suits did create a lien, and give a good title to the purchaser, to the extent of the balance of the fund. The other instruc-

tion, though somewhat too general in its terms, might very well have been given, upon the evidence before the jury.

Judgment reversed, and cause remanded. Judge WAGNER concurs; Judge LOVELACE absent.[67]

DUNCUFT v. ALBRECHT.

(High Court of Chancery, 1841. 12 Sim. 189.)

Bill in equity for specific performance of an oral agreement for the sale of fifty shares of stock in the London & Southwestern Railway Company. The defendant demurred to the bill on the ground, among others, that shares in a railway company come within the description of goods, wares, and merchandise, and hence that an oral contract for their sale comes within the 17th section of the Statute of Frauds.[68]

THE VICE-CHANCELLOR (SHADWELL)[69], without hearing them, said: I do not feel any difficulty about this case; because I think that the verbal agreement, as it is stated, is quite sufficient. * * *

In my opinion this is a case to which the 17th section of the Statute of Frauds does not apply; because it is impressed upon my mind that, in the decisions which have been made with respect to the 17th section, it has been held to apply only to goods, wares and merchandizes which are capable of being in part delivered. If there is an agreement to sell a quantity of tallow or hemp, you may deliver a part; but the delivery of a part is not a transaction applicable, as I apprehend, to such a subject as railway shares. They have been decided not to be land. They have been decided to be, in effect, personal estate; but not personal estate of the quality of goods, wares and merchandizes within the meaning of the 17th section. * * *

Then there is nothing, as I understand, either in the statute of frauds or in the law of this court, which prevents the execution of such an agreement as is here stated: and, though it may be true that the plaintiff has asked more than this court would give or might give under certain circumstances; my opinion is that he has stated quite enough to show that he is entitled to some relief: and, therefore, the demurrer must be overruled. See Hibblewhite v. McMorine, 6 Mees. & Welsb. 200; Adderley v. Dixon, 1 Sim. & Stu. 607; Ex parte Lancaster Canal Company, Montagu's B. C. 116; and Humble v. Mitchell, 2 Railway Cases, 70.[70]

[67] See Daniel v. Gold Hill Mining Company, 28 Wash. 411, 68 Pac. 884 (1902).

[68] Statement of facts substituted.

[69] A part of the opinion is omitted.

[70] The decision was affirmed by the Lord Chancellor July 23, 1841.

Contra: Tisdale v. Harris, 20 Pick. (Mass.) 9 (1838); North v. Forest, 15 Conn. 400 (1843). Compare Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359 (1852); Spear v. Bach, 82 Wis. 192, 52 N. W. 97 (1892).

BOSTON MUSIC HALL ASS'N v. CORY et al.

(Supreme Judicial Court of Massachusetts, 1880. 129 Mass. 435.)

COLT, J. In 1874, Howard L. Hayford sold five shares in the stock of the Boston Music Hall Association to his brother Nathan H. Hayford, to whom he delivered a stock certificate, and upon which he indorsed and signed a written transfer in the usual form. No transfer was made on the books of the corporation, and there was no provision in the charter or by-laws of the association, requiring it. It was not until after the shares were levied on as the property of Howard L., in May, 1878, that the corporation was notified of the alleged sale and transfer to Nathan H. In the meantime Howard L., with the knowledge of his brother, collected the annual dividends declared on the stock, attended meetings of the stockholders, and served upon committees appointed at such meetings. Under the levy made in 1878, Barney Cory bought the stock as the property of Howard L., and the question presented by this bill of interpleader is, which of the two acquired the title.

The case comes up on an appeal from the decree of a single judge in favor of Nathan H. Hayford, accompanied by a report of the evidence taken at the hearing. In the first place, it is contended that the evidence fails to show that the stock was sold and assigned to Nathan H., in good faith at any time before the levy. Upon this question of fact, the decision of the single judge will not be reversed unless it clearly appears to be erroneous. Reed v. Reed, 114 Mass. 372; Montgomery v. Pickering, 116 Mass. 227.

The only evidence of the transaction in 1874 comes from the two Hayfords, who were the parties to it. But we cannot say that the fact that the apparent ownership remained unchanged for such an unusual length of time upon the books of the corporation, and that Howard L. received the dividends and continued to act as the real owner, is sufficient to lead us to believe that the judge erred in not treating it as sufficient to overcome the positive evidence of a valid sale of the property, coming from the two witnesses who were before him, and of whose truthfulness he had the best opportunity to judge.

In the next place, it is strenuously urged that, by force of the various statutes of this Commonwealth relating to the ownership and transfer of stock in corporations, authorizing the attachment of shares, requiring returns to the Secretary of the Commonwealth, and imposing a personal liability on stockholders for the debts of the corporation, there can be no transfer of stock, valid against the claims of an attaching creditor, unless such transfer be recorded in the books of the corporation. Gen. Sts. c. 68, §§ 10, 12; c. 123, §§ 59–61; c. 133, § 46. St. 1864, c. 201. The intention of the Legislature, it is said, must

have been to provide for the owners of stock a convenient and uniform method of transferring title on the books of the corporation, which should be the only valid transfer as to creditors, and others interested; and, although the statutes have not provided in express terms, that as to creditors transfers shall not be valid till they are so recorded, yet such, it is contended, is the necessary implication, for otherwise the design of the statutes, requiring registration and making the shares liable to be taken for debts, would be defeated. But this consideration is not sufficient to control the law as long since settled by the decisions of this court. It requires a clear provision of the charter itself, or of some statute, to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules the delivering of a stock certificate, with a written transfer of the same to a bona fide purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor. Sargent v. Essex Marine Railway, 9 Pick. 202; Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; Fisher v. Essex Bank, 5 Gray, 373; Dickinson v. Central National Bank, 129 Mass. 279, 37 Am. Rep. 351.

It would not be in accordance with sound rules of construction to infer, from the provisions of several different statutes passed for the purpose of obtaining information needed to secure the taxation of such property, or for the purpose of subjecting stockholders to a liability for the debts of a corporation, or for protecting the corporation itself in its dealings with its own stockholders, that the Legislature intended thereby to take from the stockholder his power to transfer his stock in any recognized and lawful mode. If a change in the mode of transfer be desirable, for the protection of creditors, or for any other reason, it is for the Legislature to make it by clear provisions, enacted for that purpose.

We see nothing in the facts which can be held to deprive Nathan H. Hayford of the stock in question, on the ground that he is chargeable with laches in not causing the transfer to be sooner recorded, or that he is now estopped from setting up his title to the shares in his possession. It must be taken, upon the findings of the judge, that Nathan H. bought these shares in good faith in 1874; and that all which the law required was done to vest a perfect title in him, as against an attaching creditor of Howard L. He was under no legal duty to have the transfer recorded in order to perfect his title as against strangers, and he can be charged with no neglect or laches which would involve the forfeiture of his title.

The evidence in the case does not require us, against the findings of the single judge, to find that Nathan H. is estopped to set up his title against a creditor of Howard L. The acts and declarations of the latter, after the sale, would not affect the title, except so far as they were authorized by Nathan H., and there is nothing to show

any act or declaration authorized by the latter, with intent to give a false credit to Howard L., or that any creditor of his was in fact defrauded. Decree affirmed.[71]

CRAIG v. HESPERIA LAND & WATER CO.

(Supreme Court of California, 1896. 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316.)

HAYNES, C.[72] Action for the conversion of stock in a corporation. Defendant is a corporation, organized under the laws of this state. On November 18, 1893, plaintiff was the owner of 50 shares of stock in the defendant corporation, represented by certificates Nos. 72 and 79, each for 25 shares. These certificates were in defendant's possession. On the day above mentioned, plaintiff, having agreed to sell 40 of said shares to one Kaelin, offered to indorse and deliver said certificates to the corporation, and demanded that 40 shares thereof be transferred to said Kaelin, and new certificates issued,—one to Kaelin for 40 shares, and one to himself for the remainder. This demand was refused, for reasons about which there was some controversy, though it is reasonably clear that the only reason given for not complying with the demand was that the stock was "in litigation." On November 20th, two days after the demand, this action was brought. The defense to the action is based upon the claim that the stock in question is liable for certain unpaid assessments. The court refused all the instructions requested by the plaintiff, and instructed the jury to return a verdict for the defendant. This appeal is from the judgment and an order denying plaintiff's motion for a new trial. * * *

The record is silent as to any provision in the by-laws of the corporation affecting the question, nor is there any express provision of the statute permitting or prohibiting the transfer of certificates of stock upon the books of the corporation during delinquency; and the question to be determined is whether the corporation, by a transfer of plaintiff's shares after an assessment thereon became delinquent, affected its right to enforce its assessment against the shares so transferred?

Respondent contends, "that, after an assessment, and before delinquent sale, the assessment not having been paid, a transfer of de-

[71] See Lipscomb v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938 (1904).

On the effect of a by-law or statute providing that an assignment may be made only by transfer on the books of the company, or that it is void except as between the immediate parties, see Continental National Bank v. Eliot National Bank (C. C.) 7 Fed. 369 (1881), and Ottumwa Screen Co. v. Stodghill, 103 Iowa, 437, 72 N. W. 669 (1897).

Compare Scripture v. Francestown Soapstone Co., 50 N. H. 571 (1871).

[72] Part of the opinion is omitted.

linquent shares to a stranger would entirely defeat the power or the authority of the corporation to collect its dues in the manner provided for in the Civil Code."

In support of this contention counsel argue that "the corporation had a lien (or the equivalent of a lien, so far as holding appellant to his status as a book owner of the shares), which appellant could not defeat by diverting the shares into a new channel of ownership beyond the reach of the corporation." The lien, however, is upon the shares, and not upon the certificate. The certificate is merely evidence of ownership of the shares. When an old certificate is surrendered, and a new certificate is issued, the new certificate represents the same shares; but the shares themselves remain subject to any lien the corporation may have upon them, and the new owner takes subject to such lien. The identity of the stock is not affected by the transfer. Hawley v. Brumagim, 33 Cal. 394; Atkins v. Gamble, 42 Cal., at pages 99, 100, 10 Am. Rep. 282. The keeping of a stock book, in which the original issue and all subsequent transfers must be entered, enables the holder or purchaser to trace his shares back to the original issue by the numbers of the different certificates, and thus identify the shares upon which any assessment has been made, and enables him to ascertain with certainty, in connection with the other records of the corporation relating to assessments and delinquent sales, whether his shares are free from liens or liability in favor of the corporation, and in the same manner enables the corporation to enforce its delinquent assessment upon the shares liable therefore, no matter how many transfers have been made subsequent to the assessment; each transferee taking the legal title, but subject to the assessment, just as the grantee of the legal title to land takes it subject to all valid recorded liens.

If respondent's contention is sound, it must follow that transfers upon the books must cease, when the assessment is made, for any or all of the shares assessed may become delinquent; and it would also follow that, if an assessment were made which stockholders generally regarded as illegal, and they should contest the same in the courts, they would be obliged, pending the litigation, however protracted it might be, either to hold their stock subject to all the liabilities of a "bookholder" until the end of the litigation, or pay an unjust or illegal assessment. Such ruling would improperly and unjustly interfere with the disposition of property by the owner, and would not add to the security of the corporation in the collection of delinquent assessments. (A certificate of stock is not a negotiable instrument.) Barstow v. Mining Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; Graves v. Mining Co., 81 Cal. 304, 22 Pac. 665; Swim v. Wilson, 90 Cal. 129, 27 Pac. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110. In analogy to other nonnegotiable instruments, a purchaser would take subject to all equities in favor of the corporation;

but whether a transferee upon the books would take his stock discharged of any lien undisclosed by the corporation at the time of the transfer and the issuance of a new certificate, need not now be determined, nor do I think it was determined in the case of Craig v. Water Co., 107 Cal. 675, 40 Pac. 1057 (the pleadings in which case are set out in the record in this case), inasmuch as it may have been held in that case that the voluntary payment of $7 per share was regarded as an indebtedness of the corporation to the contributors, and that assessment No. 4 was made to meet that and other liabilities.

If, then, the transfer of plaintiff's shares upon the books of the corporation, and the issuance of new certificates, would not have affected the power of the corporation to collect the delinquent assessment on such shares by a sale thereof, such delinquency did not justify the refusal to make the transfer, and plaintiff's objection to evidence of those facts set up in the answer, if offered as a full defense to the action, should have been sustained, though proof of the unpaid delinquent assessment would have been admissible as affecting the value of the stock; and it also follows that the court erred in instructing the jury to find for the defendant.

Water Co. v. Herberger, 82 Cal. 603, 23 Pac. 134, cited by respondent, sustains the views we have expressed. I can discover no difference between the right of a corporation to collect a valid assessment, and its right to collect a stipulated part of subscription to stock, nor how the nonpossession of the certificate affects that right in either case. In Mandlebaum v. Mining Co., 4 Mich. 465, cited by respondent, the question arose between a stockholder who had lost his certificate, to which was attached a blank power of attorney for its transfer signed by the original holder, of whom the loser purchased it, and the vendee of the finder, who had purchased it in good faith, and to whom the company issued a certificate after notice of the loss by the true owner. It was there held that the holder of a certificate so indorsed and transferred is entitled to the same rights respecting it, as against third parties, which the law confers upon the holder of commercial paper. It is obvious that a broad distinction exists between that case and this. The corporation there might well be estopped to deny the title of one to whom it transferred the stock after notice of the loss, but that does not touch the question of its right to enforce a delinquent assessment notwithstanding the transfer. In this state neither the finder of an indorsed certificate nor his vendee would acquire any right to the stock. Sherwood v. Mining Co., 50 Cal. 412.

The fact that plaintiff did not know of the assessment at the time he demanded the transfer, nor at the time suit was commenced, does not affect the validity of the assessment, nor the liability of the stock therefor; but it is evident that, if respondent's contention is sound,

the holder of stock may not only be deprived of the benefit of an advantageous sale, which he would desire to make under any circumstances, but he would be denied the right to dispose of his stock to avoid personal liability for debts about to be incurred which he did not approve, and which, in his judgment, would be ruinous, not only to the corporation but to himself as a stockholder. The judgment and order appealed from should be reversed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.[73]

BANGOR ELECTRIC LIGHT & POWER CO. v. ROBINSON.

(Circuit Court of the United States, 1892. 52 Fed. 520.)

In Equity. Bill of interpleader brought by the Bangor Electric Light & Power Company, a Maine corporation, and Frederick M. Laughton, president thereof, and a citizen of Maine, against Elizabeth R. Lee and Augustus G. Robinson, both citizens of Massachusetts, to determine the right to a certificate of 100 shares of stock in the complainant corporation. Decree in favor of defendant Robinson.

The bill shows that complainant Laughton, in his individual capacity, sold to defendant Robinson the certificate of stock in question, and transferred the same to him by an indorsement in blank, that no transfer on the books of the company had ever been made, and that the stock had subsequently come into possession of defendant Lee, who still retained it, and claimed a right to hold it as collateral security, and that Robinson also still claimed to be the owner thereof, and had notified the company to that effect. From the separate answers of the defendants and the proofs, it appeared that Robinson had certain business relations with one Williams, a broker, and that they had in common a safety deposit box, to which each had access; that Robinson placed the certificate therein, and that, without his authority or knowledge, Williams abstracted it therefrom, and transferred it to Mrs. Lee, as collateral security for a loan, and that he subsequently disappeared without repaying the money borrowed. The answer of Mrs. Lee averred, among other things, that Williams was introduced to her by Robinson, who recommended him to her in high terms, represented that he was honest, and advised her to buy stocks through him and deal with him, and stated that he himself had employed Williams as his financial agent to buy and sell stocks, and intended to do so in future. She further averred that, believing these representations, she had various dealings with Williams, including that already mentioned.

PUTNAM, Circuit Judge.[74] * * * The court is of the opinion

[73] See In re Discoverer's Finance Corporation, Ltd., Lindlar's Case [1910] 1 Ch. 207; Adams v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386 (1882).

[74] A part of the opinion is omitted.

that whatever took place personally between Robinson and Mrs. Lee was purely of a friendly character, in no sense allied to business transactions, entirely in good faith, and not to be held by the law to prejudice either. The counsel for Mrs. Lee bring forward the proposition that when one of two innocent persons must suffer from the fraud of a third, the loss must be borne by him whose negligence enabled the third person to commit the fraud; and they cite on this point Allen v. Railroad Co., 150 Mass. 200, 207, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185. It can hardly be said that this is a rule of the common law; but, if it were, the practical application of it is not helped by the general terms in which it is expressed. The court is forced to the conclusion that it does not apply to relieve Mrs. Lee any more than it would an innocent purchaser for full value of jewelry stolen as the result of careless exposure by the owner. Mrs. Lee either purchased outright, or advanced money on a pledge of the certificate, or both; but the details of this are of no consequence, because, having advanced a valuable consideration in good faith, she stands in the courts of the United States the same in either view. Robinson was absent when the transaction took place; and, if he had been within reach, non constat that she would have inquired of him concerning the certificate, there being nothing on it to show that he had any interest in it. Indeed, there was no person of whom she could inquire, unless of Laughton, the indorser of the certificate. As he had parted with it long before, he could not have aided her. She had no means of protecting herself. Robinson, with reasonable care, could easily have protected all parties. If it were a mere question of balancing equities, or of throwing the loss on the innocent party, the court would have little difficulty, and it regrets that the result of the case must be contrary to what seems natural justice.

The evidence shows, and it is not disputed, that the certificate of stock was deposited by Robinson in a box in the Boston Safe-Deposit & Trust Company, under such circumstances that both Robinson and the broker of whom Mrs. Lee purchased had access to it. The certificate, however, was not intrusted to the possession of the broker, either directly, indirectly, or impliedly; nor was he authorized to remove it from the box. His misdoing was not embezzlement or fraud, but criminal larceny at common law. The condition of things was like that of two persons, lawyers or brokers, occupying the same office, with a common safe or vault, to which each has access, and in which each is accustomed to deposit his papers or securities. The general principle which the court must follow has been stated as late as April of the current year by Lord Herschell in Bank v. Simmons, [1892] App. Cas. 201, 215, as follows: "The general rule of the law is that, where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken

in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments."

Consider first the exception in behalf of negotiable instruments. This does not extend to bills of lading indorsed in blank, certificates of stock indorsed in blank, bonds or scrip payable to bearer or indorsed in blank and overdue, nor to instances like those in Parsons v. Jackson, ubi supra [99 U. S. 434, 25 L. Ed. 457], and Baxendale v. Bennett, 3 Q. B. Div. 525, where the negotiable paper had been drawn and signed, but never issued. In the view of the court, the rule concerning certificates of stock indorsed in blank is correctly stated in Daniel on Negotiable Instruments (4th Ed.) §§ 1708, 1709. They have a certain quasi negotiability, arising largely, if not entirely, from the fact that the holder has voluntarily made delivery to some other person, and thus precluded himself by the general principles of estoppel; and more particularly by the fact that he has given an apparently unrestricted authority, which cannot be limited to the injury of others by undisclosed instructions. This latter proposition is the ordinary rule applicable to all agencies, and is thoroughly illustrated in Breckenridge v. Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353. In this case the defendant intrusted to a third person her signature in blank for a business purpose. It was used in violation of the undisclosed authority, and the court sustained the transaction. Certificates of stock indorsed in blank are so far of a negotiable character that they ordinarily pass from hand to hand, that they are not subject to lis pendens, and that, as stated by Daniel, in order to effectuate the ends of justice and the intention of the parties, the courts ordinarily decree a better title to the transferee than actually existed in the transferrer. Nevertheless, we do not find that any court of authority has ever gone so far as to hold that the holder of them may lose the title to such as may be stolen from him, as he may of negotiable promissory notes, bills, scrip, or bonds, payable to bearer or indorsed in blank.

Touching the other proposition found in the foregoing citation from Bank v. Simmons, namely, that the purchaser shows that "the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so," the rule is stated quite generally, but its application is limited. The court need not refer to the well-known cases in which a party stands by silently, and permits his property to be disposed of without a protest. The contest at bar relates to the mere negligence of the original holder, and how far this may prevent him from reclaiming his property. At first it occurred to the court that, inasmuch as Robinson had seen fit to leave this certificate in such condition as to indicate that somebody was authorized to acquire it and fill in the indorsement, he was barred; but

the court is unable to find any authorities sustaining this suggestion, and is compelled to treat this certificate, indorsed in blank and stolen, as it would any other stolen property, aside from strictly negotiable securities.

There has been at times a disposition to lay down broadly rules touching negligence in cases analogous to this. In Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67, these rules were largely discussed. The opinion pointed out that they apply only when there is some special duty or confidential relation between the parties, as between a depositor and the bank; and it was held that the maker of a note was not liable for the increased amount by which it was raised, notwithstanding the careless manner in which he had drawn it. The same principle was also discussed in Baxendale v. Bennett, ubi supra; where it was held that, although the defendant had completed a blank acceptance, and left it in the drawer of his writing table, which was unlocked, from which it was stolen, and afterwards filled up and purchased by an innocent party, yet he was not liable thereon. In Abbott v. Rose, 62 Me. 194, 204, 16 Am. Rep. 427, the broader rule was stated with favor, but it was not material to the case, and is not harmonious with the principles of the later decisions,—Breckenridge v. Lewis, ubi supra, and other cases already cited. In all the cases in any way pertinent relied on by the counsel of Mrs. Lee there was a voluntary intrusting of actual possession by the holder. On the whole, the court is unable to find any principle of the common law which will protect her; and the case at bar, though in equity, involves only common-law rights.

Let there be a decree that the blank transfer on the certificate of stock in question in this case, deposited in the registry of the court, be filled up in favor of defendant Robinson, and that the plaintiff corporation issue him a new certificate in exchange therefor, and that complainants recover one half of their costs from defendant Robinson and one half from defendant Lee.

WOOTEN v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina, 1901. 128 N. C. 119, 38 S. E. 298, 56 L. R. A. 615.)

MONTGOMERY, J.[75] This case was heard in the court below upon an agreed state of facts, those material to the decision of the case being as follows: Eliza Claudia Bradley died in 1854, leaving a last will and testament, in which she bequeathed to her son Charles W. Bradley 20 shares of capital stock of the Wilmington & Raleigh Railroad Company (now the Wilmington & Weldon Railroad Company), registered in her own name on the stock ledger of the company, to be held by him

[75] A part of the opinion is omitted.

in trust for the sole and separate benefit of the testatrix's daughter Lucy A. Jewett during her life, and upon her death to the use and benefit of such children as she might leave surviving her. On December 1st following, Charles W. Bradley and James A. Bradley, the duly-qualified executors named in the will, transferred the 20 shares of stock on the books of the company "to Charles W. Bradley, trustee for Lucy A. Jewett," and a new certificate of stock was issued by the company in those words. In July, 1869, Charles W. Bradley, trustee, transferred the stock to Lucy A. Jewett absolutely, the word "trustee" appearing on the company's transfer ledger after Bradley's name, and a new certificate of stock was issued by the company to Mrs. Jewett individually. Afterwards, in the same year (1869), after her husband's death, Mrs. Jewett sold and transferred the stock to other persons absolutely, and new certificates of stock were issued to the purchasers, but the stock cannot now be identified nor its ownership traced. The stock was not sold by the executors to pay the debts of Mrs. Bradley, the financial condition of her estate not requiring a sale for that purpose. The defendant company had no knowledge of the condition of Mrs. Bradley's estate, and no actual knowledge of the contents of her will. Mrs. Jewett died in 1898, and the plaintiffs are her children, except the plaintiff Edward Wooten, who intermarried with Eliza Yonge Jewett.

The action is brought to recover from the defendant the value of the stock and the increment, by way of dividends, which has accrued since the death of Mrs. Jewett. The question for decision, then, is this: Does the transfer of the stock of a corporation on the books of the company by an executor fix the coporation with knowledge of the contents of the will? If so, then the transfer of the stock by the executors of Mrs. Bradley to Mrs. Jewett was wrongful, because the trust created in the will in favor of the plaintiffs was not observed in the transfer, and the plaintiff would be entitled to recover the value of the stock and the accrued dividends since the death of Mrs. Jewett.

It is incumbent on a corporation to protect the rights of persons interested in the stock of the corporation, against unauthorized transfer of the stock. Cox v. Bank, 119 N. C. 302, 26 S. E. 22; Lowry v. Bank, 15 Fed. Cas. 1040. The contention of the plaintiffs is that, when the executors of Mrs. Bradley transferred on the books of the company the stock to Charles W. Bradley as trustee for Mrs. Jewett, the company was fixed with knowledge of the contents of the will, and that in the transfer the trust in favor of the children of Mrs. Jewett, the plaintiffs, should have been preserved, under the provisions of the will; that the defendant should have seen that the transfer should have been made to Charles W. Bradley in trust, or as trustee for Mrs. Jewett for her life, and at her death to her children who might survive her. The plaintiffs further contend that the defendant also committed a wrongful and unlawful act in permitting on its books the transfer

of the stock by Charles W. Bradley, trustee of Mrs. Jewett, to his cestui que trust, absolutely, and the transfer by Mrs. Jewett to others.

The defendant insists that, as the stock on the books stood in the name of Mrs. Bradley, the only thing necessary for it to take notice of, when an entry of transfer of the stock should be requested to be made on the books, was the exhibition to it of the letters testamentary from the proper court by the executors, the transfer to follow as a matter of course, according to the directions of the executors; that the executors, so far as defendant's liability is concerned, could have sold and transferred not only the stock, notwithstanding it was specifically bequeathed, but that they could have done so even in fraud, provided the company had no reasonable ground to believe that they were acting fraudulently, or disposing of the money for their own benefit in the transaction, and that they could have negligently or fraudulently failed to execute the trust imposed by the will upon them in reference to this stock and its transfer, provided the defendant did not have actual knowledge or information, which might reasonably put them on their guard concerning the fraud or negligence, at or before the time of the transfer, and on the ground that in law the personal property of a testator is vested in the executor, with the right to sell or dispose of it, and that the company was not compelled to take notice of the contents of the will. * * *

In support of its position, the defendant's counsel referred the court to the cases in our own Reports of Tyrrell v. Morris, 21 N. C. 559; Gray v. Armistead, 41 N. C. 75; Bradshaw v. Simpson, 41 N. C. 246; London v. Railroad Co., 88 N. C. 584; Wilson v. Doster, 42 N. C. 231; to the Bank of England Cases on the same subject; to Hutchins v. Bank, 12 Metc. (Mass.) 421, especially, among other decisions of other states; to Thomp. Corp. § 2531; Schouler, Ex'rs, § 351; 1 Cook, Corp. § 330, and Lowell, Stocks. We will now examine these citations of the defendant.

We think the cases referred to in our own Reports have no application directly to the question to be decided. They are upon a point about which there is no controversy, to wit, that executors and administrators having the right of property in the personal property of the decedent have therefore the right to sell securities of the estate, and the mere fact of selling is no breach of trust, and a purchaser is not liable without actual notice that the administrator intended to misapply the funds or to use them for his own purpose; for the purposes of the estate may require the representative to dispose of it. In 1 Cook, Corp. § 330, there is a treatise concerning the sale of stock by executors and administrators, and the rights and duties of corporations in allowing and refusing to allow a registry on the corporate transfer book of the sale of the stock by an executor or administrator, and the concluding part of the section is read: "In general, a corporation has a right to assume that the executor is transferring stock for the purposes of the estate. It is not obliged to inquire into the purposes of

the party, nor to investigate whether the transaction is in good faith or fraudulent, nor to examine the will."

That seems to sustain the defendant, although the matter treated of is the sale of stock, and not the registration of the transfer of stock to a legatee, and its effect upon the corporation, without taking notice of the contents of the will. But the only case cited under that section (Smith v. Railroad Co., 91 Tenn. 221, 18 S. W. 546) is diametrically opposed to the doctrine of the text. In that case the owner of the stock died testate, but without having named an executor. An administrator cum testamento annexo was appointed, and he delivered a part of the stock to a legatee named in the will absolutely, although she had only a life estate therein, and had the same transferred to the legatee on the books of the corporation. He made the transfer as administrator simply, without the words "cum testamento annexo." The court said there: "We are of the opinion that upon the facts of this case the corporation is not now liable to an action on this ground. It had no knowledge that there was a will limiting the title of Fannie Baugh to this stock, and there were no circumstances connected with the transfer by Mr. Howe, as administrator, calculated to put it upon inquiry as to the existence or terms of a will. He assigned the certificate standing in the name of his decedent simply as administrator. If he had assigned as administrator cum testamento annexo, it would have been notice of a will. The assignment was to the 'heirs and distributees,' not legatees, of J. W. Baugh. In this respect, the case is to be distinguished from Covington v. Anderson, 16 Lea (Tenn.) 310, and Caulkins v. Gaslight Co., 85 Tenn. 685, 4 S. W. 287," 4 Am. St. Rep. 786.

Section 2531 of Thompson's Commentaries on the Law of Corporations contains the broad statement that the "letters testamentary show an apparent right to dispose of the stock of the testator, even though bequeathed specifically, and, on principle, the company is bound to respect his title, and transfer them according to his desire." And the cases of Bayard v. Bank, 52 Pa. 232, and Hutchins v. Bank, 12 Metc. (Mass.) 421, support the text. The matter embraced in section 351, Schouler, Ex'rs, is to the same effect, with a reference to Bayard v. Bank, supra.

But, in addition to the authorities cited by defendant's counsel, they say that the case of Lowry v. Bank, supra, when properly understood, is authority for the defendant, and Mr. Rountree in his brief quotes an extract from the opinion in that case, to wit: "Undoubtedly the mere act of permitting this stock to be transferred by one of the executors furnishes no ground for complaint against the bank, although it turns out that this executor was by the act of transfer converting the property to his own use, for an executor may sell or raise money on the property of the deceased in the regular execution of his duty, and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money. Such is the doctrine of the Eng-

lish courts, and would seem to have been the law of this state prior to Act Assem. Dec. Sess. 1843, c. 304, and the transaction now before us took place before that act went into operation. But it is equally clear that if a party dealing with an executor has at the time reasonable ground for believing that he intends to misapply the money, or is in the very transaction applying it to his private use, the party so dealing is responsible to the persons injured."

But in that part of the opinion last quoted the chief justice was considering the matter of a sale of the stock by the executor, without intending to weaken the force or to affect the correctness of the other doctrine decided in the case, and which we have been discussing; that is, that knowledge by a corporation that there is an executor is knowledge that there is a will, and also constructive knowledge that the contents of the will are known to the corporation.

After mature consideration of all the cases cited and the text in the law books to which our attention has been called, our opinion is:

First, that, where a transfer of stock of a corporation is made on its books by an executor, the corporation is fixed with a knowledge that there is a will, and is chargeable with a knowledge of its contents to the same extent as if the officers had actually read it.

Second, that, notwithstanding such knowledge of the contents of the will, the executor may, even with intent to convert to his own use the money, sell and transfer such stock to a purchaser under the corporation's supervision, and that, even though the stock be specifically bequeathed in the will, without liability on the part of the corporation, unless it has at the time of the transfer reasonable ground to believe that the executor intends to misapply the money, or is in the very transaction applying it to his own private use.

We have arrived at the conclusion, however, that, as the corporation is fixed with the knowledge of the contents of the will when the executors transfer stock on its books, the provisions of the will in reference to the stock must be carried out in the transfer at the peril of the company in cases where the transferee is a legatee named in the will; that is, the corporation must, at the time of the transfer, ascertain whether the transfer is to a purchaser from the executor in the usual course of administration and the regular execution of his duty as executor or to a legatee named in the will.

The defendant, for another defense, takes the position that before a recovery can be had the negligence of the defendant must not only be established, but it must be shown that the transfer by the executor to Charles W. Bradley, trustee for Lucy A. Jewett, individually, was the proximate cause of the loss to the plaintiffs. Mr. Davis in his brief says: "But assuming, for the sake of the argument, that the defendant was negligent in this respect, yet it is clear that this was not the proximate cause of the loss to the plaintiffs. The title was in their trustee, and, under the law, he held it as well for them as for Lucy A.

Jewett. No loss was occasioned to them by this transfer, and no injury or damage sprung from it, and, but for another and subsequent intervening cause, to wit, the act of the trustee, Charles W Bradley, in 1869, in transferring the stock to Lucy A. Jewett, none would have occurred."

But the legal title to the stock was not in any trustee of the plaintiffs. It was in Charles W. Bradley, the trustee of Mrs. Jewett, individually. The first transfer, however, was the effective cause of the loss, and the other transfers were steps made possible by the first one, which led to the loss even of the identity of the stock or its ownership. The first transfer was wrongful, in that it was the duty of the defendant to have protected the rights of the plaintiffs, and the plaintiffs had the right, at the death of their mother, to call for a return of the stock or its value. St. Romes v. Cotton-Press Co., 127 U. S. 614, 8 Sup. Ct. 1335, 32 L. Ed. 289.

The defendant further sets up the statute of limitations against the demand of the plaintiffs. We are not deciding that the plaintiffs had no right to interfere in the transfer of the stock to have it restored to its proper ownership at any time after the wrongful transfer, but they were not compelled to take action for the recovery of the stock or its value until after the death of their mother which occurred in 1898. This action was commenced in 1899, and is not, therefore, barred by the statute of limitations.

His honor rendered judgment, upon the facts agreed, that the defendant company was liable to the plaintiffs for the value of the stock at the date of the death of Mrs. Jewett, and, by consent, that the matter be referred to a referee "to hear evidence and take testimony, and determine the value of said stock, and all other issues of law and fact raised by the pleadings not herein set out and adjudicated, and to determine what sum, if any, the plaintiffs are entitled to recover." There was no error in the judgment of the court, and the same is affirmed.

In re BAHIA & S. F. RY. CO., Limited.

(Court of Queen's Bench, 1868. L. R. 3 Q. B. Cas. 584.)

On the 11th of May, 1867, it was ordered by rule of court, under 25 & 26 Vict. c. 89, § 35, that the name of Amelia Trittin be restored to the register of the Bahia and San Francisco Railway Company in respect of the five shares in the company numbered 84,511 to 84,515, both inclusive, and that the company do pay to Amelia Trittin any dividends that have fallen due since the shares were transferred from her name. And it was further ordered that a special case be stated for the opinion of this Court between the Reverend Richard Burton and Mary Anne Goodburn and the company, for the purpose of de-

termining the amount of damages (if any) which the company were liable to pay them respectively.

1. On the 8th of March, 1866, Miss Amelia Trittin was the registered holder of five shares in the Bahia and San Francisco Railway Company, Limited, hereafter called "the company," and deposited the certificates of the shares with one Thomas Charles Oldham, a stockbroker, and requested him to keep the same and to receive the dividends payable thereon.

2. On or about the 17th of April, 1866, a transfer of the five shares to John Alfred Stocken and Samuel Goldner, purporting to be executed by Amelia Trittin, but which for the purpose of this case is admitted to have been a forgery, was left with the secretary of the company for registration, together with the certificates of the shares.

3. The secretary of the company, in the ordinary course of business, then sent by post to the last place of residence of Miss Trittin a written notice that the deed of transfer had been so received by him, and after ten days having received no answer from her, registered the deed of transfer and removed the name of Miss Trittin from and placed the names of John Alfred Stocken and Samuel Goldner upon the register of shareholders as holders of the aforesaid five shares, and share certificates in respect of the said shares were handed to them.

4. In May, 1866, the Reverend Richard Burton through his broker bought on the Stock Exchange four shares in the company, and Mrs. Mary Anne Goodburn by her broker bought one share.

5. About the same time, John Alfred Stocken and Samuel Goldner sold five shares in the company to Arthur Bristowe, a stockbroker, and in pursuance of the above contracts transferred four of the shares comprised in the forged transfer to Mr. Burton, and the remaining one to Mrs. Goodburn.

6. It is admitted that Mr. Burton and Mrs. Goodburn entered into the contracts above-mentioned bona fide and for value of the shares, without notice of any fraud, and according to the usual course of business with reference to the purchase of shares, and on or shortly after the 28th of May, 1866, they were duly registered by the company as the holders of the shares, and share certificates in respect thereof were handed to them.

6a. In the above transactions everything was done by the company in accordance with the usual custom of business, and there was nothing in the circumstances so far as they were known to the company to excite their suspicion or to induce them to depart from such usual course of business. * * *

The questions for the opinion of the Court were: 1. Whether, as against the company, Mr. Burton and Mrs. Goodburn are entitled to the said shares in the company, or an equivalent number. 2. Whether they are entitled to any and what damages to be paid to them by the company under the above circumstances.

The Court were to make such order and give such judgment as they might think fit, and have power to make and give.[76]

COCKBURN, C. J. I am of opinion that our judgment must be for the claimants. If the facts are rightly understood, the case falls within the principle of Pickard v. Sears, 6 Ad. & E. 469, and Freeman v. Cooke, 2 Ex. 654, 18 L. J. (Ex.) 114. The company are bound to keep a register of shareholders, and have power to issue certificates certifying that each individual shareholder named therein is a registered shareholder of the particular shares specified. This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general: and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares. It is stated in this case that the claimants acted bona fide, and did all that is required of purchasers of shares; they paid the value of the shares in money on having a transfer of the shares executed to them, and on the production of the certificates which were handed to them. It turned out that the transferors had in fact no shares, and that the company ought not to have registered them as shareholders or given them certificates, the transfer to them being a forgery. That brings the case within the principle of the decision in Pickard v. Sears, 6 Ad. & E. 469, as explained by the case of Freeman v. Cooke, 2 Ex. 654, 18 L. J. (Ex.) 114, that if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact.

The only remaining question is, what is the redress to which the claimants are entitled. In whatever form of action they might shape their claim, and there can be no doubt that an action is maintainable, the measure of damages would be the same. They are entitled to be placed in the same position as if the shares, which they purchased owing to the company's representation, had in fact been good shares, and had been transferred to them and the company had refused to put them on the register, and the measure of damages would be the market price of the shares at that time; if no market price at that time then a jury would have to say what was a reasonable compensation for the loss of the shares.

PER CURIAM. The rule will be that the company do pay to the claimants the value of their respective shares on the 10th of October,

[76] Statement of facts abridged.

1866, and interest from that time at 4 per cent., as damages, together with costs.

Rule absolute accordingly.[77]

FIRST AVE. LAND CO. v. PARKER.

(Supreme Court of Wisconsin, 1901. 111 Wis. 1, 86 N. W. 604, 87 Am. St. Rep. 841.)

The complaint alleged incorporation of the plaintiff; that on November 12, 1891, E. L. Babcock, since deceased, was duly elected secretary, and that he gave, and the defendant George F. Parker, as surety, executed, a bond conditioned that he should pay and account for all moneys, security, and property coming into his hands as secretary, and well and truly perform all the duties of his office and trust as such secretary; that by the articles of association and by-laws it was the duty of the secretary to sign, with the president, all certificates of stock, and to issue and deliver the same to the several subscribers on payment of the several subscriptions, and not otherwise; that said E. L. Babcock subscribed for 500 shares of $10 each, and that one Charles Wilhelm subscribed for a like amount, thereby agreeing to pay the sum of $1,000 in cash, the time of payment of the balance not being specified; that among Babcock's duties was, as secretary, to collect and pay over to the treasurer the full amount of the cash payments due from Wilhelm and himself upon their stock subscriptions, before issuing or delivering said stock to either of them; that at the first meeting of the stockholders it was provided and agreed that the first 20 per cent. of each subscription should be paid in cash at the date of such meeting, to apply upon the purchase price of a tract of land, and that certificates of paid-up stock should be issued to each of the subscribers to the amount of their several cash payments; that said E. L. Babcock, as secretary, unlawfully combining with the president, also now deceased, caused to be issued to himself thereafter 100 shares of paid-up stock in said corporation without consideration, and without making the said cash payment of $1,000, or paying any other sum; and subsequent to such issue, he, during his lifetime, conveyed the same to Hattie E. Babcock and J. M. Babcock for value, who now claim to be the holders and owners thereof free from all equities or rights of the plaintiff; and also, in like combination, issued a certificate for 100 shares of the paid-up capital stock to said Wilhelm, without the payment of any consideration therefor, and without the making of any part payment, which said Wilhelm transferred for value to one William Yewdale, who has ever since held the same, and claims to be,

[77] The concurring opinions of Blackburn, Mellor, and Lush, JJ., have been omitted.

Compare George Whitechurch, Limited, v. Cavanagh, [1902] L. R. App. Cas. 117. See Machinists' National Bank v. Field, 126 Mass. 345 (1879).

and, as plaintiff believes, is, the bona fide holder thereof for full value; that thereafter said assignees of stock presented their certificates, duly assigned, which thereupon were canceled, and new certificates issued therefor by the said president and the said Babcock as secretary, in due form, purporting on their face to be fully paid and nonassessable, and were delivered by said Babcock to said transferees, who ever since have held the same, claiming title thereto, and interest in the property and assets of the plaintiff corporation, free from all infirmity or illegality; that Wilhelm has no property, and is insolvent, and that Babcock died in the year 1894, leaving no estate whatever, and insolvent; that the other surety to the bond died in March, 1894; that by reason of the premises the plaintiff has suffered damages in the sum of $2,000, together with interest from the 26th day of December, 1891, for recovery of which the complaint prays.

A general demurrer to this complaint was sustained, from which action the plaintiff appeals.

DODGE, J. (after stating the facts). The case presented by this complaint is a very simple one, and not in accord with the situation discussed in Land Co. v. Hildebrand, 103 Wis. 530, 79 N. W. 753, of which we are told that this is a sequel. As now before us, it merely appears that there were issued two certificates of stock, each for $5,000 par value, without any consideration; that is, neither for money, nor for labor or property, actually received by the corporation, equal to the par value thereof, as required by section 1753, Rev. St. 1898. This being so, no reason is apparent upon which to escape the further provisions of the same section that "all stocks and bonds issued contrary to the provisions of this section shall be void." Indeed, counsel for appellant concedes effective applicability of that section to the stock originally issued, but contends that, certificates of stock having been issued by the corporation asserting the ownership of stock by the parties named, upon due consideration therefor, the corporation is estopped to deny, as against one innocently purchasing such stock in reliance upon the facts so certified to be true, that the persons named did own such shares of stock. As a result of this estoppel, he contends that the innocent purchasers have become entitled to the same rights as if the certificates were true, namely, to a share in the ownership of the corporation itself, and all other rights incident to the actual ownership of stock. This is the damage to the corporation claimed to have resulted from Babcock's breach of his official duty. It is, of course, obvious that, if this position is sound to its full extent, section 1753 is very much emasculated, for that doctrine would give practical validity to stock which the statute declares shall be void. It would likewise give practical existence and validity to stock beyond the power of the corporation. Certificates issued and passed to innocent holders would give to them the right to hold stockholders' meetings, of which they might constitute a majority, to control the affairs of the company, and to share with the owners of actual capital in distribution of dividends

or assets. A corporation limited by its charter to $100,000 of stock might thus have outstanding rights in individuals to represent twice that volume.

As already stated, appellant plants his contention on the doctrine of estoppel, and cites numerous authorities asserting applicability of that doctrine to corporations in issuing certificates of stock. The cases cited present several phases of the effect of the doctrine. Thus courts have refused affirmative relief by way of cancellation of outstanding certificates improperly issued, but held in good faith, and for value (Bank v. Field, 126 Mass. 345; Beach Co. v. Harned [C. C.] 27 Fed. 484; Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777); also by way of compelling payment of unpaid subscription or assessments where certificates falsely declared stock full paid (Steacy v. Railroad, 5 Dill. 348, 372, Fed. Cas. No. 13,329; Rood v. Whorton [C. C.] 67 Fed. 434; Nicholl's Case, 26 Wkly. Rep. 334). In other cases the false certification of stock has been held to support action for damages on the ground of fraud. Holbrook v. Zinc Co., 57 N. Y. 616; Shaw v. Mining Co., 13 Q. B. Div. 103. In one case the supreme court of Michigan held the holder of a certificate issued upon a forged transfer of valid stock entitled to the rights of a stockholder, but based its decision on a peculiarly drastic statute of that state. Mandlebaum v. Mining Co., 4 Mich. 465.

We are not inclined to dispute the propositions that, when the officers of a corporation act within the scope of their powers, the corporation acts, nor that, subject to inherent distinctions between artificial and natural persons, a corporation may be estopped by its acts as effectively as may a natural person. But neither legal rules nor legal fictions can overcome physical facts nor laws of nature. Closing the mouth of a party to deny will not create what cannot exist. The estoppel, however complete, against one who makes two conveyances of the same piece of land, cannot transpose it into two pieces; and that impossibility must be recognized by courts in the practical application of the estoppel and adjustment of rights. Hence it is not surprising that all courts, in applying to corporations estoppel to deny the assertions of their certificates, have stopped short of holding that thereby could be created capital stock which, under the law, could not have existence.

Counsel for appellant concedes such limit in the case of attempted overissue of stock, recognizing that, when all of the capital stock possible of existence under the law has been issued, no more can come into being by any process. A corporation capable of only 1,000 shares of capital stock cannot, by estoppel, be transformed into one of 2,000. "Overissued stock, no matter how overissued, represents nothing, and is wholly and entirely valueless and void." Cook, Corp. § 292. "Any issue of stock in excess of the amount of the capital stock as fixed by the charter is null and void. * * * His [the purchaser's] certificate is so much waste paper, and he is not a stockholder." Id. § 426.

This principle that estoppel cannot create capital stock which the law does not permit to exist is conclusive, under our statute, supra, against appellant's contention that by the official misconduct of the secretary in issuing full-paid certificates without any payment in fact the corporation has been damaged by the creation of stockholders' rights in those who hold such certificates, or reissues in place of them. No such rights have been created, for by section 1753, Rev. St. 1898, such stock is "void." That statute, as this court has heretofore said, was a "declaration of a public policy." Clarke v. Lumber Co., 59 Wis. 655, 660, 18 N. W. 492. It asserts the legislative will that those otherwise dealing with corporations shall be protected, rather than those dealing in stock certificates. To effectuate that legislative purpose, the law must be enforced as it is written, and the prohibited issues of stock must be held void as stock, although those procuring such unlawful issues may often be held liable to pay therefor. Jenkins v. Bradley, 104 Wis. 540, 80 N. W. 1025; Shaw v. Gilbert (decided May 21, 1901) 111 Wis. 165, 86 N. W. 188. Attempts by the corporation to issue stock in defiance of this statute are as completely ineffective as attempts to issue in excess of the total authorized by law or charter.

It thus appearing, that the corporation has not suffered the damage pointed out and principally insisted on by appellant, it remains to be considered whether any other damage to it appears with reasonable certainty from the allegations of the complaint. There is a suggestion that in some way the corporation has lost its opportunity to collect from those who subscribed for this stock by reason of the wrongful delivery of the certificates, followed by their transfer, and issue of new certificates to others. No such loss is apparent. The liability of Babcock and Wilhelm upon their respective subscriptions was not thereby impaired, and there is no allegation that the solvency or collectibility of either of them diminished subsequently to the stock issue, if that fact were in any wise material. We can discover no damage in that connection resulting from the secretary's acts. There is, however, a possible injury to the corporation, which may result from the issue and transfer of the void certificates by the officers having general power and authority to issue certificates of capital stock, so that their acts, whether valid or invalid, must be deemed to be the acts of the corporation itself. The consensus of decision is well-nigh uniform to the effect that, although such certificates cannot create stock or stockholding beyond that authorized by law, they do constitute declarations of fact of the most solemn and unambiguous character, reliance upon which in the community is to be expected; and that the corporation must respond in the only way it can to protect from loss those who innocently and without negligence act in reliance on the truth of such declarations. While the corporation, by reason of its legal limitations, cannot make good the false certificate of existence and ownership of stock, it can respond in money to reimburse any damages actually suffered by those who rely on the facts so certified.

We find its liability so to do declared with great unanimity. Cook, Corp. § 293, says: "Although it is settled law that overissued stock is void and valueless, and that no action lies either to compel the corporation to recognize the holder as a stockholder or to issue in place thereof a valid certificate, yet where overissued certificates of stock, signed or purporting to be signed by the corporate officers having the authority to issue stock, and actually issued by such officers, are purchased by any person, or are taken in any manner in good faith and for value, such bona fide holder may sue the corporation in tort and recover damages." Some of the more important cases supporting this view are the following: Railroad Co. v. Schuyler, 34 N. Y. 30; Bank of Kentucky v. Schuylkill Bank, Pars. Eq. Cas. (Pa.) 180; Bank v. Kurtz, 99 Pa. 344, 44 Am. Rep. 112; Kisterbock's Appeal, 127 Pa. 601, 18 Atl. 381, 14 Am. St. Rep. 868; Holbrook v. Zinc Co., supra; Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, supra; Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 231; Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, note, 33 Am. St. Rep. 712; Moores v. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385; Allen v. Railroad Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185.

The result of the view above stated is that by the secretary's breach of his official duty there may be cast upon the corporation a liability for damages. That action is founded on the fraud accomplished by the false declarations in the certificate. To the existence of such liability, however, are necessary all the elements of the usual action for deceit. Of those elements the false representation is supplied by the certificate itself, but, in addition, it is necessary that the person making demand shall have relied thereon and shall have been ignorant of the falsity of the statements and free from any want of ordinary care and diligence. Shaw v. Gilbert (decided May 21, 1901) 111 Wis. 165, 86 N. W. 188; Moores v. Bank, 111 U. S. 156, 166, 4 Sup. Ct. 345, 28 L. Ed. 385; Farrington v. Railroad, 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222. The complaint, upon most liberal construction, fails to allege that either of the purchasers of the stock certificates wrongfully issued by Babcock was ignorant of their falsity or relied thereon. It therefore does not state facts sufficient to show even that any liability has been cast upon the plaintiff by reason of their issue.

Such being the case, there is no occasion to consider the further question whether an action could be maintained upon breach of the bond in suit when such breach had merely resulted in creating a liability, and before plaintiff had actually been compelled to pay anything thereon. On that general subject see Lyle v. Machine Co., 108 Wis. 81, 84 N. W. 18, 51 L. R. A. 906; Farnsworth v. Boardman, 131 Mass. 115, 122; Kip v. Brigham, 7 Johns. (N. Y.) 168; Jackson v.

Port, 17 Johns. (N. Y.) 479. We cannot avoid the conclusion that, although the complaint sufficiently alleges official misconduct of Babcock, and, consequently, a technical breach of the bond, it fails to show that any damage has thereby been caused the company by imposing upon it either pecuniary loss or liability thereto. Hence the demurrer must be sustained.

By THE COURT. The order appealed from is affirmed.[78]

[78] See New York & New Haven R. Co. v. Schuyler, 34 N. Y. 30 (1865).

CHAPTER V

DIRECTORS

SECTION 1.—POWERS AND LIABILITIES

CHARLESTOWN BOOT & SHOE CO. v. DUNSMORE et al.

(Supreme Court of New Hampshire, 1880. 60 N. H. 85.)

Case. Demurrer to the declaration in which the following facts were alleged: The plaintiffs are a manufacturing corporation having for its object a dividend of profits, and commenced business in 1871. Dunsmore was elected director in 1871 and Willard in 1873, and entered upon the discharge of their duties, and have continued so to act by virtue of successive elections until the present time. December 10, 1874, the corporation voted to choose a committee to act with the directors to close up its affairs, and chose one Osgood for such committee. Osgood tendered his services, but the defendants refused to act with him, and contracted new debts to a larger extent than allowed by law. By their negligence, debts due to the corporation to the amount of $2,161.23 have been wholly lost. By their negligence in disposing of the goods of the corporation a loss has accrued of $3,300.40. By their neglect to sell the buildings and machinery of the corporation when they might and ought, and were urged by Osgood to sell, the same depreciated in value to the extent of $20,000.

Also for that the plaintiffs owned and possessed a certain shop of the value of $10,000, and a large amount of machinery and fixtures of the value of $10,000; "and whereas it was the duty of said defendants directors as aforesaid, to procure sufficient and proper insurance against fire to be made on said property, and keep the same so sufficiently insured, of all which the said defendants had notice, yet they did not and would not keep the said property so insured, and afterwards, to wit, on the 28th day of April, 1878, while the said property was so remaining without insurance, the same was wholly consumed by fire and wholly lost to the plaintiff, whereby the plaintiff suffered great loss and damage, to wit, $20,000."

SMITH, J. The provision of the statute is, that the business of a dividend paying corporation shall be managed by the directors. The statute reads, "The business of every such corporation shall be managed by the directors thereof, subject to the by-laws and votes of the corporation, and under their direction by such officers and agents as shall be duly appointed by the directors or by the corporation." G.

L. c. 148, § 3; Gen. St. c. 134, § 3. The only limitation upon the judgment or discretion of the directors is such as the corporation by its by-laws and votes shall impose. It may define its business, its nature and extent, prescribe rules and regulations for the government of its officers and members, and determine whether its business shall be wound up or continued; but when it has thus acted, the business as thus defined and limited is to be managed by its directors, and by such officers and agents under their direction as the directors or the corporation shall appoint. The statute does not authorize a corporation to join another officer with the directors, nor compel the directors to act with one who is not a director. They are bound to use ordinary care and diligence in the care and management of the business of the corporation, and are answerable for ordinary negligence. March v. Railroad, 43 N. H. 516, 529; Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513, 543; Ang. & Ames, Corp. § 314. There is no difference in this respect between the agents of corporations and those of natural persons, unless expressly made by the charter or by-laws. Id. § 315. It would be unreasonable to hold them responsible for the management of the affairs of the corporation if compelled to act with one who to a greater or less extent could control their acts. The statute not only entrusts the management of the business of the corporation to the directors, but places its other officers and agents under their direction. When a statute provides that powers granted to a corporation shall be exercised by any set of officers or any particular agents, such powers can be exercised only by such officers or agents, although they are required to be chosen by the whole corporation; and if the whole corporation attempts to exercise powers which by the charter are lodged elsewhere, its action upon the subject is void. Insurance Co. v. Keyser, 32 N. H. 313, 315, 64 Am. Dec. 375. The vote choosing Osgood a committee to act with the directors in closing up the affairs of the plaintiff corporation was inoperative and void.

The declaration also alleges that it was the duty of the defendants as directors, to keep the property of the corporation insured. There is no statute that makes it the duty of the directors of a corporation to keep its property insured, and there are no facts alleged from which we can say, as matter of law, that it was the duty of the defendants to insure the property of the corporation.

Demurrer sustained.

AUTOMATIC SELF-CLEANSING FILTER SYNDICATE CO., Limited, v. CUNINGHAM

(Supreme Court of Judicature. L. R. [1906] 2 Ch. Div. 34.)

Motion. The Automatic Self-Cleansing Filter Syndicate Company, Limited, was incorporated on June 10, 1896. The original capital of the company was £700., divided into 700 shares of £1. each; but the

capital had since been increased, and there had now been issued 2700 shares of £1. each.

The objects of the company, as stated in clause 3 of its memorandum of association, were (inter alia): (a) To acquire from James Wilson the benefit of certain existing inventions in relation to the filtration, treatment, purification, storage, application, distribution, and use of liquids; and (k) to sell the undertaking of the company, or any part thereof, for such consideration as the company might deem fit, and in particular, for shares, debentures, or securities of any other company having objects altogether or in part similar to those of this company.

The articles provided as follows:

"81. The company may by special resolution remove any director before the expiration of his period of office and appoint another qualified person in his stead. * * *"

"96. The management of the business and the control of the company shall be vested in the directors, who, in addition to the powers and authorities by these presents expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting; but subject nevertheless to the provisions of the statutes and of these presents, and to such regulations, not being inconsistent with these presents, as may from time to time be made by extraordinary resolution, but no regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

"97. Without prejudice to the general powers conferred by the last preceding clause, and to the other powers and authorities conferred as aforesaid, it is hereby expressly declared that the directors shall be entrusted with the following powers, namely, power—

"(1) To purchase or otherwise acquire for the company any property, letters patent, rights or privileges which the company is authorized to acquire, at such price, and generally on such terms and conditions, as they think fit; also to sell, lease, abandon, or otherwise deal with, any property, rights, or privileges to which the company may be entitled, on such terms and conditions as they may think fit."

"(16) To enter into all such negotiations and contracts and rescind and vary all such contracts, and execute and do all such acts, deeds, and things in the name or on behalf of the company as they might consider expedient for or in relation to any of the matters, aforesaid, or otherwise for the purposes of the company."

The plaintiff A. H. McDiarmid, who was the holder of 1202 shares in the plaintiff company, being desirous that the assets and undertaking of the plaintiff company should be sold, arranged terms on behalf of the company for the sale of them to a new company formed for

the purpose of acquiring them, and had these terms embodied in a contract which was engrossed ready for execution by the company.

On January 2, 1906, a meeting of the shareholders of the company, convened by the directors in accordance with a requisition signed by the plaintiff McDiarmid and other shareholders in the company, was held for the purpose of considering and if thought fit passing the following resolution:

"That the company do sell the assets specified in the contract which has been produced to the meeting at the price and on the terms therein mentioned and contained and that the directors be and they are hereby directed to cause the common seal of the company to be affixed thereto within seven days and to carry the same into effect."

The meeting was adjourned until January 16, when the resolution was passed by a majority of 304 votes, 1502 votes for and 1198 votes against it. Practically the whole of the 1502 votes were given in respect of shares held by the plaintiff McDiarmid or his friends.

The directors, being of opinion that it would not be in the interests of the plaintiff company that the contract should be carried out, declined to comply with the resolution.

This was a motion by the plaintiff company and by the plaintiff McDiarmid, suing on behalf of himself and all other shareholders in the company, against the directors asking that the defendants might be ordered forthwith to affix the seal of the plaintiff company to the contract and to carry it into effect; that the defendants might be restrained by injunction until judgment or further order from dealing with or disposing of the assets of the plaintiff company intended to be comprised in the said agreement in any manner inconsistent with the terms thereof; and for the appointment of a receiver of the said assets.

The motion was heard before Warrington J. on February 23, 1906.

Cave, K. C., and A. H. Jessel, for the plaintiffs. The directors are the agents of the company, and as such are bound to obey the directions of their principal, the company. The plaintiffs merely desire that the directors shall do what the company in general meeting has ordered them to do.

(WARRINGTON, J. Why not remove the directors?)

That would require a three-fourths majority. The company in general meeting has power to direct and control the directors in the management of the affairs of the company. Isle of Wight Ry. Co. v. Tahourdin (1883) 25 Ch. D. 320.

(WARRINGTON, J. The company has by article 96 delegated the management of its business to the directors.)

The company can revoke that delegation.

(WARRINGTON, J. The article can only be altered by a special resolution.)

(Norton, K. C., referred to Grant v. United Kingdom Switchback Railways Co. [1888] 40 Ch. D. 135, and Buckley on Companies, [8th Ed.] p. 557.)

The articles are subject to the general rule that agents must obey the directions of their principal.

(WARRINGTON, J. If you are right in your contention a simple majority of the shareholders might control the company.)

A company does not part with its powers by delegating them to its directors. The Court will not force upon a company a policy of which it does not approve. Bainbridge v. Smith (1889) 41 Ch. D. 462.

Norton, K. C., and L. Mossop, for the directors, were not called upon.

WARRINGTON, J., stated the facts, and continued: The question I have to determine in this case is whether the shareholders of a company have power by a resolution passed by a simple majority of their number to order the directors to seal an agreement for the sale of the whole of the assets of the company notwithstanding that the directors may think that the sale is improvident, and that the terms on which it is to be carried out are not fit terms on which the company ought to carry out such a sale. To my mind this question depends upon the true construction of the articles. The only articles which are material are articles 96 and 97. (His Lordship read the articles, and continued:)

The effect of this resolution, if acted upon, would be to compel the directors to sell the whole of the assets of the company, not on such terms and conditions as they think fit, but upon such terms and conditions as a simple majority of the shareholders think fit. But it does not rest there. Article 96 provides that the management of the business and control of the company are to be vested in the directors. Now that article which is for the protection of a minority of the shareholders, can only be altered by a special resolution, that is to say by a resolution passed by a three-fourths majority, at a meeting called for the purpose, and confirmed at a subsequent meeting. If that provision could be revoked by a resolution of the shareholders passed by a simple majority, I can see no reason for the provision which is to be found in article 81 that the directors can only be removed by a special resolution. It seems to me that if a majority of the shareholders can, on a matter which is vested in the directors, overrule the discretion of the directors, there might just as well be no provision at all in the articles as to the removal of the directors by special resolution. Moreover, pressed to its logical conclusion, the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not able to remove the directors, overrule every act which the board might otherwise do. It seems to me on the true construction of these articles that the management

of the business and the control of the company are vested in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration of the articles, such alteration, of course, requiring a special resolution.

No case has been cited to me which, in my opinion, has really any bearing on this question, which depends on the construction of the articles. In Isle of Wight Ry. Co. v. Tahourdin, 25 Ch. D. 320, which was a case under the Companies Clauses Consolidation Act, 1845, it was pointed out by the Court of Appeal that the resolution which it was proposed to submit to the meeting, and upon which the question arose, was one which could be carried by a simple majority of the company. Moreover, all that was there decided was that the Court would not interfere to prevent a meeting of shareholders being held. No decision was given as to what would be the result with reference to the validity of any resolution which might be passed at the meeting.

On the whole, it seems to me that the resolution which was passed at the general meeting on January 16, 1906, is not one which the directors are bound to carry into effect. The consequence is, I must refuse the motion, with the usual result—that is to say, the costs will be the defendants' costs in the action.[1]

GASHWILER et al. v. WILLIS et al.

(Supreme Court of California, 1867. 33 Cal. 11, 91 Am. Dec. 607.)

SAWYER, J.[2] The Rawhide Ranch Gold & Silver Mining Company is a corporation duly organized under the statutes of California for the purpose of carrying on the business of mining. On the 29th of April, 1865, a special meeting of the stockholders of the corporation was held, pursuant to notice, at the office of the company, at which all the stockholders were present. At this meeting of the stockholders, all the stockholders being present and all the capital stock represented, a resolution was unanimously adopted authorizing S. S. Turner, T. N. Willis and James J. Hodges, Trustees of said corporation, for and on behalf of said corporation, to sell and convey to D. W. Barney the mine, mill, buildings, mining implements, and appurtenances belonging to said company. In pursuance of said resolution, and without any other authority shown, on the

[1] The concurring opinions of Collins and Cozens-Hardy, JJ., are omitted. The ruling of Warrington, J., was sustained by the Court of Appeal.

See Union Mutual Fire Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375 (1855); Hutchinson et al. v. Green et al., 91 Mo. 367, 1 S. W. 853 (1886).

[2] Statement of facts omitted as sufficiently stated in the opinion, a part of which is omitted.

5th of June following a conveyance was executed by said Turner, Willis and Hodges, Trustees, the commencement and form of execution of which are as follows:

"This indenture, made the 5th day of June, A. D. 1865, between the Rawhide Ranch Gold & Silver Mining Company, a corporation under the laws of the State of California, by S. S. Turner, T. N. Willis and James J. Hodges, Trustees of said corporation, who are duly authorized and empowered by resolution and order of said corporation to sell and convey," etc.

"In witness whereof we, as the Trustees of and for and on behalf of said corporation, have hereunto set our hands and seal (the said corporation having no seal) the day and year first above written.

"T. N. Willis, [L. S.]
"James J. Hodges, [L. S.]
"S. S. Turner, [L. S.]

"Trustees of the Rawhide Ranch Gold & Silver Mining Company."

On the trial, after proving the adoption of the resolution before referred to at a meeting of the stockholders, as stated, the plaintiffs offered said deed in evidence, and defendants objected to its introduction on the three grounds—that it did not appear to be the act or deed of the corporation; that it had not the signature of the corporation, and that it was not sealed with the corporate seal but with the individual seals of the Trustees. The Court sustained the objection and excluded the deed, to which ruling plaintiffs excepted; and this ruling presents the question to be determined.

Under the view we take, it will only be necessary to consider the first ground of the objection, and the question is, does the instrument in question appear to be the act or deed of the corporation? If not, it was properly excluded, and the judgment must be affirmed. It is claimed by respondents that no authority is shown in the parties executing to execute the deed on behalf of the corporation. If the deed of a natural person, purporting to have been executed by an attorney in fact, were offered in evidence, it would, clearly, be inadmissible, without first showing the authority of the attorney. The recital of the authority in the deed itself would furnish no evidence whatever of its existence. The same is true of an artificial person—a corporation—at least, where the corporate seal is not affixed. Whether the rule would be different when the regularly adopted corporate seal is shown by competent proof to be affixed it is not necessary now to inquire; for it affirmatively appears in this instance that the corporation has no seal, and that the parties executing the instrument used their respective private seals, no express authority to adopt such seals being shown. It may also be admitted for the purposes of this decision, that it is competent for the corporation to adopt the private seal of the several Trustees, or any one of them as its seal pro hac vice, and that the conferring upon the agent power

to execute the deed necessarily includes the power to adopt a seal on behalf of the corporation for the occasion. Still, as a seal regularly adopted by the corporation was not in fact used, it is necessary to show authority in the agent to execute the deed, in order to show, by implication authority in him to adopt a seal for the occasion. The authority of the Trustees to execute the instrument in question must, therefore, affirmatively appear, or it does not appear to be the act or deed of the corporation.

We are not aware of anything in the law, independent of any authority expressly conferred by the corporation, which authorizes Turner, Willis and Hodges, in their official character as Trustees, to execute the instrument in question on behalf of the corporation. No law of the kind has been called to our attention, and we do not understand that any is claimed by appellants' counsel to exist. And there is nothing in the nature of those offices, as connected with the object and business of the company, from which a general power in the Trustees, when not acting as a Board, to sell and convey the mine, mill and other property of the company, could be implied. McCullough v. Moss, 5 Denio (N. Y.) 575. The parties executing the instrument, then, if they had any authority in the premises, must have derived it from some corporate act; and the only act proved or relied on is the resolution adopted at the stockholders' meeting before mentioned. This was a meeting of the stockholders only. It was called as such, and the proceedings all appear to have been conducted as a stockholders' meeting. The resolution authorizing the sale and conveyance of the mine, etc., in question, was adopted by the stockholders, as such, at said meeting, and not by the Board of Trustees, or at any meeting of said Board. The Board of Trustees do not appear to have ever acted at all upon the matter in the character of a Board, but the testimony shows that they acted in pursuance of the said resolution adopted at the meeting of stockholders.

Section five of the Act authorizing the formation of corporations for mining purposes provides: "That the corporate powers of the corporation shall be exercised by a Board of not less than three Trustees, who shall be stockholders," etc. And section seven provides that: "A majority of the whole number of Trustees shall form a Board for the transaction of business, and every decision of a majority of the persons duly assembled as a Board shall be valid as a corporate act." Laws 1853, p. 88, § 5; 7 Hittell's Gen. Laws, arts. 936, 938. Conferring authority to sell and convey the corporate property is the exercise of a corporate power, and under these provisions the "corporate powers of the corporation" are to be exercised by the Board of Trustees when the majority are "duly assembled as a Board." When thus assembled and acting the decision of the majority "shall be valid as a corporate act." We find nothing in the Act authorizing the stockholders, either individually or collectively in a stockholders' meeting, to perform corporate acts of the character in question. The

property in question was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not in their individual capacities owners of the property as tenants in common, joint tenants, copartners or otherwise. Gorham v. Gilson, 28 Cal. 484; Mickles v. Rochester City Bank, 11 Paige (N. Y.) 128, 42 Am. Dec. 103. This proposition is so plain that no citation of authorities is needed. Had the stockholders all executed a deed to the property, they could have conveyed no title, for the reason that it was not in them (Wheelock v. Moulton et al., 15 Vt. 521); and what they could not do themselves they could not by resolution or otherwise authorize another to do for them.

The corporation could only act—could not speak—through the medium prescribed by law, and that is its Board of Trustees. As well might the citizens of San Francisco in public meeting assembled, by unanimous resolution authorize certain Supervisors, designated by name, to sell and convey the City Hall. It is said, however, that the Trustees were also all present and participated in the proceedings at the stockholders' meeting and assented to the resolution; that the resolution therefore was approved by all of the constituents of the corporation, and the powers of the corporation were exhaustively exercised. But they were acting in their individual characters as stockholders, and not as a Board of Trustees. In this character they were not authorized to perform a corporate act of the kind in question. As well, also, might a valid ordinance be passed by the citizens of San Francisco in public meeting assembled, at which the Supervisors were all present and voted in the affirmative. Such an ordinance, when signed by the Mayor, would have the assent of all the constituents of the corporation as clearly as the resolution in question has in the present instance. But such is not the mode in which the corporation is authorized by the law of its creation to manifest its will and exercise its corporate powers. The power to sell and convey could only be conferred by the Trustees when assembled and acting as a Board. This is the mode prescribed. As a Board they could perform valid corporate acts, and confer authority within the province of their powers, upon the Trustees individually or upon any other parties to perform acts as the agents of the corporation. We are not without authorities upon this precise point. * * *

In this case, the resolution adopted by the stockholders was not a corporate act, and it conferred on the three Trustees named—whether they constituted the whole number of Trustees does not appear—no authority to perform a corporate act, to execute the deed, or adopt a seal for the occasion. It not only does not appear, then, that the instrument in question is the act or deed of the corporation, but it affirmatively appears that it was executed in pursuance of a resolution that conferred no authority whatever to perform a corporate act; for the plaintiffs themselves introduced in evidence the authority under which they claimed the act to have been performed, and upon which

they relied. Having done this, we are not at liberty to indulge the presumption that the parties executing the deed on behalf of the corporation were otherwise duly authorized. The authority acted upon is affirmatively shown, and this fails. We think the deed properly excluded. But even if it had been admitted without further proof of the authority of the parties to execute it, it would not have availed the plaintiffs.

As there does not appear to have been any authority in the parties assuming to act, to sell or convey at all, it is unnecessary to discuss the other questions. Judgment affirmed.

RHODES, J., did not express an opinion.[3]

HOYT v. THOMPSON'S EX'RS.

(Court of Appeals of New York, 1859. 19 N. Y. 207.)

COMSTOCK, J.[4] * * * The precise point in controversy is, whether the plaintiff or one Abraham G. Thompson became entitled to a bond and mortgage of $60,000, executed in November, 1839, by the Long Island Railroad Company, a corporation chartered by this State, to the Morris Canal & Banking Company. The last mentioned company was a New Jersey corporation, and held and owned this security until December 9, 1840, when an assignment of it was made to the State of Michigan. Thompson claimed title and acquired possession of the security under this transfer, having purchased it at auction from the agent of Michigan, in May, 1843. The plaintiff claims under a transfer, junior in point of time, made to one Sanxay his immediate assignor, by the receivers of the Morris Canal & Banking Company, on the 13th of November, 1845. Those receivers were appointed in January, 1842, by the Court of Chancery of the State of New Jersey, in a suit instituted against the Company in August, 1841, by Richards and Selden, who were its judgment creditors. If the plaintiff can impeach the prior transfer to the State of Michigan and the title which the plaintiff derived from that State, no doubt exists in regard to the validity of his own title. The validity of that assignment to Michigan is denied by the plaintiff on two grounds: First, that it was made by the executive officers of the company without the authority of the board of directors, in other words, that it was not the act of the corporation, and for that reason was utterly void. Second, on the ground that it was voidable as to creditors, under an act

[3] Opinion denying a rehearing omitted.

Compare Arkansas Pass Harbor Co. v. Manning, 94 Tex. 558, 63 S. W. 627 (1901); Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669, 110 Am. St. Rep. 207 (1905); Cunningham v. German Ins. Bank, 101 Fed. 977, 41 C. C. A. 609 (1900); Kirwin v. Washington Match Co., 37 Wash. 285, 79 Pac. 928 (1905).

[4] Facts sufficiently stated in the opinion, a part of which is omitted.

of the Legislature of New Jersey, passed February 16, 1829, "To prevent frauds by incorporated companies." These two grounds of objection have no dependence on each other, and they will, therefore, be separately considered.

First. The Morris Canal & Banking Company was authorized by its charter, granted in 1824, to construct a canal in the State of New Jersey, and also to carry on the business of banking; to buy and sell bills of exchange; to deal in public and corporate stocks; to loan money on bond and mortgage; to receive money or property in trust and to execute trusts. Its capital stock, for the purpose of building the canal, was fixed at $1,000,000, and $1,000,000 more could be added for the purpose of banking. The number of directors, originally fifteen, was increased by a supplementary act to twenty-three, and it was declared that "the corporate powers of the company should be exercised by the board." Authority was given to establish such by-laws, ordinances and regulations as should be deemed necessary or convenient for the transaction of its business. A code of by-laws was adopted, one of which provided for stated meetings of the directors, in each week, and declared that five directors, including the president, should form a quorum for the transaction of the ordinary business of the company. In the intervals between the stated meetings of the directors, the business and affairs of the company were to be managed by the standing and special committees, which were to report their proceedings for the approbation of the board. The same by-laws set forth certain acts which could not be done without the concurrence of a majority of all the directors, such as the election of officers and the filling of vacancies in the board. * * *

The first inquiry suggested by the facts stated is, whether the by-law of the company authorizing a quorum of five directors, including the president, to transact ordinary business was a valid regulation. We are clearly of opinion that it was. The charter of the company, it is true, declared that its powers should be exercised by a board of twenty-three directors, and it may well be conceded that in the absence of any different regulation, a majority of the whole number would be necessary to constitute a legal quorum for the transaction of any business whatever. But it would be a very extraordinary construction of the charter in this respect, to hold that the board of twenty-three directors, or a majority thereof, must meet and act whenever any corporate power was to be exercised, and that no delegation of authority could be made to subordinate agents, to committees, or to a quorum consisting of a smaller number. The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former, and if the power of substitution is not conferred in the appointment, it cannot exist at all.

But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the State in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform. The recognition of this principle is absolutely necessary in the affairs of every corporation whose powers are vested in a board of directors. Without it the most ordinary business could not be carried on, and the corporate powers could not be executed. It is upon this principle, not less than upon the express power contained in the charter to enact by-laws, that the by-law in question, adopted by the Morris Canal & Banking Company, rests. It was, in substance and effect, a regulation which constituted a subordinate agency to conduct the ordinary business of the corporation. The persons composing the agency would change according as the quorum of five or more directors attending the meetings might be constituted of different individuals. But if the board could delegate the power of transacting business to five or more individuals named no doubt exists that the same authority might be imparted to a shifting quorum, composed of the same number. * * *

On the whole, having re-examined the case, we are satisfied, for the reasons stated, that there is no error or misapprehension in the decision already pronounced. The motion for a reargument must, therefore, be denied, with costs.

JOHNSON, C. J., and STRONG, J., took no part in the decision; SELDEN, J., dissented. All the other judges concurring. Motion denied.[5]

[5] In Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395 (1840), Shaw, C. J., in passing on the power of a board of directors to delegate the power of conveying real estate to a committee of the board, said: "A board of directors of the banks of Massachusetts is a body recognized by law. By the by-laws of these corporations, and by a usage, so general and uniform as to be regarded as part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation. We think they do not exercise a delegated authority, in the sense in which the rule applies to agents and attorneys, who exercise the powers especially conferred on them and no others. We think, therefore, that a board of directors may delegate an authority to a committee of their own number, to alienate or mortgage real estate; that an authority to convey necessarily implies an authority to execute suitable and proper instruments for that purpose; and, in case of a corporation, to affix the corporate seal to an instrument requiring it."

In Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436 (1897), Macfarlane, J., speaking for the court, said: "At common law the power to have a board of directors was inherent in the corporation. The statute of Missouri requiring the business and property of a corporation to be managed and controlled by directors, is but an affirmance of the common law power. So likewise the directors have the power, without

TEMPEL v. DODGE.

(Supreme Court of Texas, 1895. 89 Tex. 69, 32 S. W. 514.)

BROWN, J. It appears from the application, and the record accompanying it, that the Pacific Railway Improvement Company was incorporated in the state of Connecticut in the year 1879, and organized for the purpose of constructing the Texas & Pacific Railway. In the charter of the said corporation is this provision: "The officers of this corporation shall consist of a president, vice president, secretary, and treasurer, and its affairs will be managed by a board of five directors." A by-law provided that: "An executive committee shall, immediately after the adoption of the by-laws, be appointed by the president, and afterwards, after the annual election in each year, consisting of two members and the president. Said committee shall continue in office until after the next annual election, and to said committee shall be, and is hereby, confided all the powers of the board of directors"; and further providing that the president should have power to appoint such counsel, etc., as should be necessary for carrying on the business of the company, subject to the approval of the board of directors or executive committee. These are all of the provisions of the charter and by-laws that the record discloses. The foregoing is taken from the opinion of the court of civil appeals. [See 11 Tex. Civ. App. 42, 31 S. W. 686.]

The Pacific Railway Improvement Company purchased about 17,000 acres of land in El Paso county, paying the money therefor through its then president, G. M. Dodge, the defendant in error herein, who took the deed in his own name, with the distinct understanding that it was to be the property of the said company. Some time afterwards Dodge purchased the land from the company by a verbal agreement, and claimed the same, and paid taxes thereon as his own. After this verbal purchase by Dodge, C. L. Frost, the president of the said Pacific Railway Improvement Company, and John Adamson, one of the directors of the said company, on the 23d day of February, 1890, entered into a contract with the plaintiff in error, by which he was engaged, on behalf of the said company, to institute legal proceedings in the name of the said company against G. M. Dodge for the recovery of the land before mentioned, and was to have for his services one-half

statutory authority, to delegate to officers, agents or executive committees the power to transact, not only ordinary and routine business, but business requiring the highest degree of judgment and discretion. Thus authority to manage the business of railroad corporations, insurance companies, banking institutions and other corporations having large and complicated business interests, is, usually, delegated by the directors to agents, often, but not necessarily, officers of the corporation. These agents, or managing officers, have incidental power to employ all assistants and to do all acts necessary to properly conduct the business over which they are given charge. Formal action of the board of directors is not necessary in order to confer the authority."

of the land recovered. Said appointment was in writing, and contained this clause: "And if, for any cause, the Pacific Railway Improvement Company fails to execute such deeds to such lands as he may recover for said company, or in case any suit or suits instituted under this authority be compromised without the concurrence of the said E. W. Tempel, then this obligation is to operate as a deed of conveyance of one undivided half of all lands as he may recover for said company." This instrument was signed. "C. L. Frost, President. John Adamson, Secretary. Approved by the Executive Committee: C. L. Frost. John Adamson."

No executive committee had been appointed since 1887, and none existed when this instrument was first made. The business for the transaction of which the Pacific Railway Improvement Company was created had been completed, and this committee was appointed for the sole purpose of approving this contract. After it was made and signed by Frost, as president, and Adamson, as secretary, Frost appointed John Adamson and Max Elser, directors of the said company, as said committee, and after such appointment, the indorsement, "Approved by the executive committee," was placed upon the said contract, and signed by Frost and Adamson.

This contract was never approved by the board of directors, nor by the stockholders, but afterwards the board of directors, by regular proceedings, acknowledged Dodge's right to the property, and made him a quitclaim deed therefor. Tempel had taken some steps towards recovering the property from Dodge before the quitclaim deed was made from the corporation to Dodge. He then sued Dodge and the company for one-half of the land mentioned in the agreement, and which was conveyed to Dodge by the quitclaim deed. The only title that Tempel had was derived through the instrument of writing made by Frost and Adamson; and if that conferred upon him no title, then he had no right of recovery, and this application must be denied.

Upon this statement the question arises, can the board of directors of a corporation, under a charter which imposes upon it the entire management of its affairs, confer that authority upon an executive committee, to be appointed by the president of the company? Undoubtedly, the board of directors can appoint agents, whether in the form of committees or as single agents, to transact the ordinary business of the corporation; but we believe that the rule is well settled by authority, and sustained by sound principle, that a board of directors cannot confer upon others the power to discharge duties imposed upon them which involve the exercise of judgment and discretion, except in the transaction of the ordinary business of the corporation, unless authorized so to do by the charter. Thomp. Corp. § 3944 et seq.; Green's Brice, Ultra Vires, pp. 490–492; Railroad Co. v. Richie, 40 Me. 425; Tippets v. Walker, 4 Mass. 595; Weidenfeld v. Railroad Co. (C. C.) 48 Fed. 615. The by-laws in express terms substituted the executive committee, to be appointed by the president, for

the board of directors, and attempted to confer upon that committee all of the powers given by the charter to the board of directors. Such a provision in the by-laws is so palpably in conflict with the charter under which the corporation was organized that there could scarcely be a question that the by-law would be absolutely null. This being true, the executive committee appointed by Frost, and one of which with himself, acted in this instance, was, under the facts shown in this case, without any authority to convey the title of the Pacific Railway Improvement Company to the lands in question; and its attempted conveyance to Tempel was without any effect, and conferred upon him no right or title to the land, and Dodge having acquired the title to the land by a quitclaim deed, the judgment of the court in his favor was correctly rendered.

For the reasons above given, that Tempel had no title to the land, and, therefore, could not recover in this suit, the application for writ of error is refused.

We do not find it necessary to pass upon the other question raised in the case, which is, whether or not the verbal agreement between Dodge and the improvement company was sufficient to convey to Dodge the right of the company's equity in the land.[6]

BRIGGS v. SPAULDING.

(Supreme Court of the United States, 1890. 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.)

Bill by the receiver of the First National Bank of Buffalo against R. P. Lee, F. E. Coit, E. G. Spaulding, W. H. Johnson, T. W. Cushing, as directors of the bank, Anna Vought, as executrix of J. H. Vought, F. C. Coit, J. E. Barnes, administrators of C C. Vought, former directors, to recover for losses sustained by the bank in consequence of the negligence of the directors.

The losses resulting in the failure of the bank were due for the most part to the misapplication of the bank's funds by R. P. Lee, cashier and director. The evidence disclosed that the directors allowed Lee to actually conduct the business. Reports to the comptroller of the currency on the condition of the bank were signed by them without examination and on assurance of Lee that the bank was in good condition. ' No meetings were held or called from Oct. 3, 1881, to April 14, 1882, during the period when the greatest losses were sustained. No exchange committee nor examination committee was appointed as provided by the by-laws and meetings of the board were infrequent and perfunctory although the articles of the bank provided for monthly meetings.

[6] The opinion overruling a motion for a rehearing is omitted.

It was not contended that the defendants knowingly violated, or permitted the violation of any of the provisions of the banking act, or that they were guilty of any dishonesty in administering the affairs of the bank, but it is charged that they did not diligently discharge the duties devolving upon them by the National Banking Act.

Appeal from a decree dismissing the bill as to defendants who answered, the bill having been taken as confessed as to Lee, and the executrix of J. H. Vought.[7]

FULLER, C. J.[8] In the language of appellant's counsel, the bill was framed upon the theory of a breach by the defendants as directors "of their common-law duties as trustees of a financial corporation, and of breaches of special restrictions and obligations of the national banking act."

And it is claimed that the defendants should have been held liable for the losses which occurred through loans of the bank's funds and moneys during their term of office as directors to Lee, his father, his wife, and certain designated persons, which were the principal losses, though there were others smaller in amount for which they were responsible.

This liability is alleged to have been incurred by Lee for all loans from October 3, 1881, until April 14, 1882; by F. E. Coit for all losses through the mismanagement of the bank from October 3, 1881, until April 14, 1882, which could have been prevented by reasonable diligence and care on the part of the directors; by John H. Vought on the same basis and for the same time; by Charles T. Coit from October 3 to December 11, 1881; by Cushing from October 3, 1881, to January 10, 1882, unless his liability terminated with the transfer of his stock on the books of the bank; by Spaulding and Johnson from January 10 to April 14, 1882.

It is contended as an independent proposition that each of the defendants should have been held liable for all loans made during the periods before mentioned when the loans exceeded 10 per cent. of the capital of the bank, in violation of section 5200, Rev. St., and also for all loans made while the bank's reserve was below 15 per cent. of its deposits, in violation of section 5191, Rev. St., where such loans resulted in losses.

And finally, that each of the defendants should have been held absolutely liable for all losses of the bank incurred by carrying on its business after its capital became impaired or exhausted, and the bank insolvent. * * *

Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act, although, if any director participated in or assented to any violation of the law by the board, he would be individually liable. The cor-

[7] Statement of facts abridged. Further facts appear in the opinion.

[8] A part of the opinion is omitted.

poration, after the amendment of 1874, had power to carry on its business through its officers; and although no formal resolution authorized the president to transact the business, yet in view of the practice of 14 years or more, we think it must be held that he was duly authorized to do so. It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them. Whether they were responsible for any neglect of the board as such, or in failing to obtain proper action on its part, is another question. Indeed, it is frankly stated by counsel that, "although special provisions of the statute are quoted and relied upon, these do not create the cause of action, but merely furnish the standard of duty and the evidence of wrong doing;" and section 556, Mor. Priv. Corp., is cited, which is to the effect that "the liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material, under these circumstances, merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed."

It is perhaps unnecessary to attempt to define with precision the degree of care and prudence which directors must exercise in the performance of their duties. The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in the appointment of agents. Mor. Priv. Corp. § 551 et seq., and cases. Bank directors are often styled "trustees," but not in any technical sense. The relation between the corporation and them is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract, and not of trust. But, undoubtedly, under circumstances, they may

be treated as occupying the position of trustees to cestui que trust. In Percy v. Millaudon, 8 Mart. (N. S.) 68, which has been cited as a leading case for more than 60 years, the supreme court of Louisiana, through Judge Porter, declared that the correct mode of ascertaining whether an agent is in fault "is by inquiring whether he neglected the exercise of that diligence and care which was necessary to a successful discharge of the duty imposed on him. That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks, from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties. It is not contemplated by any of the charters which have come under our observation, and it was not by that of the Planters' Bank, that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."

Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684, was the case of a bill filed by Spering, as assignee of a trust company, against its directors and others, to compel them to make good losses sustained by the depositors on the ground of fraudulent mismanagement of the affairs of the company; and Judge Sharswood, speaking for the court said: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandatories,—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply

ordinary skill and diligence, but no more. * * * We are dealing now with their responsibility to stockholders, not to outside parties,—creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many dicta not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that their responsibility is limited to these cases, and that there might not exist such a case of negligence, or of acts clearly ultra vires, as would make perfectly honest directors personally liable. But it is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places." And see Association v. Coriell, 34 N. J. Eq. 383; Hodges v. Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551.

It was in this aspect that Lord Hatherley remarked in Land Credit Co. v. Lord Fermoy, L. R. 5 Ch. 763: "Whatever may be the case with a trustee, a director cannot be held liable for being defrauded. To do so would make his position intolerable." And the same view is expressed by Sir George Jessel, M. R., in his opinion in Re Dean Coal Min. Co., 10 Ch. Div. 450, where he says: "One must be very careful in administering the law of joint-stock companies not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Willful default no doubt includes the case of a trustee neglecting to sue, though he might by suing earlier have recovered a trust fund. In that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle."

The theory of this bill is that the defendants are liable, not to stockholders nor to creditors, as such, but to the bank, for losses alleged to have occurred during their period of office, because of their inattention.

[After discussing the evidence, and the reputation for integrity of Lee, the cashier, the court proceeds:] But it is contended that defendants should have insisted on meetings of the board of directors, or had special meetings called, and at those meetings or otherwise

made personal examination into the affairs of the bank, and that, had they done this, they would have discovered the condition of the bank, and prevented losses occurring subsequently to the 10th of January.

Here, again, it should be observed that even trustees are not liable for the wrongful acts of their co-trustees unless they connive at them or are guilty of negligence conducive to their commission, and that Lee and Vought had long been directors.

It is shown that for 14 years the affairs of the bank had been left wholly with the president and cashier, and that from the 10th of January to the stoppage of the bank the business was done as it had always been done. No bonds had been required of the officers for at least 14 years. No meetings were held by the board of directors except the annual meeting and meetings to declare dividends, or on some special occasion. No exchange committee had been appointed since 1875; and no committees had ever been appointed to examine into the bank's affairs, question its cashier, or compare its assets and liabilities with the balances on the general ledger. So that this manner of conducting the business had been sanctioned by long-continued usage, and the evidence tends to show that the method pursued must have been and was well known to many of its customers, including those who were creditors at the time of its failure, as well as its stockholders. All this was not as it should have been, and ought not to be countenanced; but the facts have an important bearing on the question whether Spaulding and Johnson should be held liable because they did not at once endeavor to change the entire methods of doing business, and enter upon an exhaustive investigation of the assets. Would ordinarily prudent and diligent men have done so under similar circumstances? It is not so much a question of holding meetings as of examination, searching, and thorough; an overhauling of the bills receivable, and the detection of the uncollectible indebtedness which rendered the bank insolvent. Were Spaulding and Johnson guilty of negligence in that they did not make such an examination within 90 days after they became directors, in the teeth ot the assurances of Lee, in whom they reposed confidence, who had been connected with the bank for so many years, and who owned two-thirds of the stock?

The kind of examination required is indicated by the fact that, although the evidence leaves it beyond question that the bank was insolvent on the 3d of October, 1881, its capital and surplus wholly exhausted, and losses incurred for thousands of dollars beyond that amount, complainant, after a year's close investigation, alleges that the bank was at that time solvent, engaged in a prosperous business, with an unimpaired capital and a surplus, and with stock standing at 50 per cent. above par. Indeed, the books and papers of the bank were kept in such a condition that even the cashier swore that he

did not suspect anything wrong in the management until April 10, 1882. * * *

We are of opinion that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make such an investigation, and did not themselves individually conduct an examination during their short period of service; or because they did not happen to go among the clerks, and look through the books, or call for and run over the bills receivable.

Of course a thorough examination would have ascertained that the bank ought to be put into liquidation at once. Nothing that could have been done on or after the 10th of January would have saved it. Insolvent on the 3d of October, its condition had changed for the worse January 10th. And it is worthy of notice that the persons or firms, losses by reason of advances to whom are named in argument as the main cause of the failure and basis of recovery, were all debtors of the bank October 3, 1881, some of them for a long time before, and all debtors January 10, 1882, and the figures of the experts seem to show that the amounts due from them at the latter date were not many thousand dollars greater in the aggregate on April 14, 1882. The indebtedness of Lee, his father, and his wife was nominally less, while that of some of those through whom he appears to have conducted his operations was larger. According to him, such increase in poor assets as there was was substantially attributable to increased loans made in the hope of carrying through parties already in debt to the bank, and he says that there was really no material change in the character of the paper between January 9 and the stoppage of the bank.

But it is unnecessary to do more than refer to these matters as indicative of the uncertainty as to what losses would have been prevented if the bank had been wound up earlier than it was, and as to the point of time to which the supposed liability should be referred if an interlocutory decree had been entered.

We are not disposed, therefore, to reverse the decree as to defendants Spaulding and Johnson, and, although the case of Francis E. Coit was in some aspects different, and particularly in that he was a director for a longer period, we think it should take the same course. He was elected a director May 20, 1881, to fill a vacancy created by the death of George Coit. He was at the time an invalid, and by reason of his infirmity in health unable to transact business, at least with facility. His co-directors at the time of his election were Charles T. Coit, Vought, Cushing, and Lee. He was re-elected January 10, 1882. The evidence shows that he had for many years been afflicted with rheumatism. So far as appears, Lee, Vought, and Cushing were in good health, although Charles T. Coit was not, but the latter continued in the management of the bank down to the 3d of October. While

it may be said that Francis E. Coit should not have accepted the position of director, and should not have allowed himself to be re-elected, yet upon this question of passive negligence the rule would be an exceedingly rigorous one which made no allowance for the person charged under such circumstances; and upon the whole we do not feel called upon to question the decision as to him.

It must be remembered that in cases turning upon questions of fact in order to reverse, we must be prepared to hold that the findings were not justified, and this we cannot do, taking into consideration all the facts contained in this voluminous record, which we have attempted thoroughly to explore.

The turning point, so far as defendants Spaulding and Johnson are concerned, (and we include with them Francis E. Coit,) is whether under all the circumstances they were guilty of negligence, producing any of the losses in question, not affirmatively, but because they did not prevent them; and this depends upon whether they should have made an examination of the books and assets of the bank, and whether, if they had, that would have enabled them to discover such a condition of affairs as would have resulted in placing the bank in liquidation, and whether thereby some of the losses would have been averted.

Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention; but in this case we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within 90 days after they became directors, and it is really to that the case becomes reduced at last. For the reasons given, the decree will be affirmed.

HARLAN, J. (dissenting.) Mr. Justice GRAY, Mr. Justice BREWER, Mr. Justice BROWN, and myself are unable to concur in the opinion and judgment of the court.* * * *

We are of opinion that when the act of congress declared that the affairs of a national banking association shall be "managed" by its directors, and that the directors should take an oath to "diligently and honestly administer" them, it was not intended that they should abdicate their functions, and leave its management and the administration of its affairs entirely to executive officers. True, the bank may act by "duly-authorized officers or agents" in respect to matters of

* A part of the opinion is omitted.

current business and detail that may be properly intrusted to them by the directors. But certainly congress never contemplated that the duty of directors to manage and to administer the affairs of a national bank should be in abeyance altogether during any period that particular officers and agents of the association are authorized or permitted by the directors to have full control of its affairs. If the directors of a national bank chose to invest its officers or agents with such control, what the latter do may bind the bank as between it and those dealing with such officers and agents. But the duty remains, as between the directors and those who are interested in the bank, to exercise proper diligence and supervision in respect to what may be done by its officers and agents.

As to the degree of diligence and the extent of supervision to be exercised by directors, there can be no room for doubt under the authorities. It is such diligence and supervision as the situation and the nature of the business require. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths and to the obligations they assume, they must do all that reasonably prudent and careful men ought to do for the protection of the interests of others intrusted to their charge.

In respect to the dealings of a bank with others this court has said: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known, in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." Martin v. Webb, 110 U. S. 7, 15, 3 Sup. Ct. 428, 28 L. Ed. 49. A rule no less stringent should be applied as between a banking association and directors representing the interests of stockholders and depositors. Subscriptions to the stock of a banking association, and deposits with it, are made in reliance upon the statutory requirement, which cannot be dispensed with, that its affairs are to be managed and administered by a board of directors, acting under oath, and with such diligence as the situation requires.

In Cutting v. Marlor, 78 N. Y. 454, 460, Chief Justice Church, delivering the unanimous judgment of the court, said: "A corporation is represented by its trustees and managers. Their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this, but, in addition, they are required to exercise such supervision and

vigilance as a discreet person would exercise over his own affairs. The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice, especially those so openly committed and easily detected as these are shown to have been. Here were no supervision, no meetings, no examination, no inquiry." This case was referred to with approval in Preston v. Prather, 137 U. S. 604, 614, 11 Sup. Ct. 162, 34 L. Ed. 788. So in Hun v. Cary, 82 N. Y. 65, 71, 37 Am. Rep. 546, which involved the question of the degree of diligence to be exercised by directors of a savings bank, Judge Earl, speaking for the whole court, said: "Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them,—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such degree of care and prudence, and it is a gross breach of duty—crassa neglegentia—not to bestow them." Ackerman v. Halsey, 37 N. J. Eq. 356, 361; Halsey v. Ackerman, 38 N. J. Eq. 501, 510; Society v. Underwood, 9 Bush, 609, 621; Mining Co. v. Ryan, 42 Minn. 196, 44 N. W. 56; U. S. v. Means (C. C.) 42 Fed. 599, 603; Delano v. Case, 121 Ill. 247, 249, 12 N. E. 676, 2 Am. St. Rep. 81; Percy v. Millaudon, 3 La. 568, 591; Marshall v. Bank, 85 Va. 676, 684, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84 and Bank v. Bosseiux (D. C.) 3 Fed. 817. * * *

These salutary doctrines, if applied to the present case,—as, in our judgment, they ought to be,—require a reversal, with directions that a decree be entered adjudging Elbridge G. Spaulding, Francis E. Coit's estate, and W. H. Johnson liable for such losses occurring during the period in question as could have been avoided by the exercise of reasonable diligence upon the part of said Coit, Johnson, and Spaulding, respectively, in performing the duties appertaining to them as directors. The case is one of supine, continuous negligence upon the part of the three directors named, in the discharge of duties they owed to the bank and to those interested in it. No usage of a national bank, nor any authority to carry on its business through executive officers and agents, will relieve its directors from the duty imposed upon them by law of diligently managing and diligently administering its affairs, and actively supervising the conduct of its officers and agents.

There was here no diligence, no supervision, but absolute inaction in respect to the affairs of the bank.

It was said at the bar that if such a rule be rigidly applied, a gentleman of property and means would hesitate long before accepting the position of director in a banking association. This could not be the result if gentlemen of that class, becoming directors of such institutions, would exercise anything like the care and supervision they or any other prudent, discreet persons give to the management of their own business. They ought not, by accepting and holding the position of directors, give assurance to stockholders and depositors, whose interests have been committed to their control, that the bank is being safely and honestly managed, without doing what prudent men of business recognize as essential to make such an assurance of value. A banking corporation, publicly avowing that its business was to be wholly administered by executive officers, and that the directors would have nothing in fact to do with its management, would not long retain the confidence of stockholders and depositors; a fact which, of itself, shows that the abdication by directors of their duties and functions not only tends to defeat the object for the creation of such an institution, but puts in peril the interests of stockholders and depositors.[10]

DOVEY v. CORY.

(House of Lords, 1901. L. R. App. Cas. 477.)

EARL OF HALSBURY, L. C.[11] My Lords, in this case the liquidator of the National Bank of Wales, Limited, appeals against a judgment of the Court of Appeal, whereby Mr. John Cory, the respondent, was discharged from the liability which Wright, J.'s judgment had imposed upon him to pay £37,000 for the benefit of the shareholders of the company in respect of dividends already distributed, and a further sum for interest.

Mr. John Cory was a director of the company, and it is for his supposed misconduct in the management of the affairs of the company that this liability was imposed upon him. It is alleged and proved that certain losses have been sustained by the company, and the ground upon which Mr. John Cory is sought to be made liable is the very short and intelligible ground that he was a party to false and fraudulent statements as to the position of the company, and had had a share in causing those losses. The Court of Appeal have acquitted him of any knowledge of what was falsely stated, and Sir Robert Reid, in opening this appeal, stated to your Lordships that he

[10] Compare Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120 (1901); Kavanaugh v. Commonwealth Trust Co., 64 Misc. Rep. 303, 118 N. Y. Supp. 758 (1906).

[11] Facts sufficiently stated in the opinion.

did not intend, in arguing for Mr. John Cory's liability, to impute to him any moral obliquity. Now, there is no doubt that there were balance-sheets laid before meetings of the shareholders which, to use the language of the articles of association, were not proper and which did not truly report as to the state and condition of the company, and did not comply with the requirements of the articles in question in respect of the particular sum which the directors recommended as dividend that it should be paid out of profits, but a greater sum was paid out as dividend than would have been paid if certain things had been taken into consideration, and therefore larger than should have been paid.

A great part of the judgment, both of Wright J. and of the Court of Appeal, is occupied by discussing matters which are not now before your Lordships as matters in debate. It is now admitted that Mr. John Cory ceased to be a director in December, 1890.

My Lords, I am very clearly of opinion that the judgment of the Court of Appeal is right and ought to be affirmed; but my opinion is entirely based upon the question of fact that he was guilty of no breach of duty whatever, and, for reasons which I will refer to hereafter, I am very anxious not to deal with some reasons given for their judgment by the Court of Appeal, which, in the view of the facts that I take, do not arise here; and in what I say I desire to be understood as only dealing with the facts of this particular case.

Now, in the first instance, I will assume that the company has sustained loss by the issue of fraudulent balance-sheets, by the improper advance of money to the customers of the bank, and that it has also sustained loss by the lending of money to directors without security. With respect to the default involving liability, if Mr. John Cory was conscious of the falsehood it is not necessary to go any further. Like any one else who is a party to a false statement acted upon to the prejudice of the person to whom it is made, he would be liable to the extent to which his falsehood has inflicted loss on his victims. But after the admission that has been made it is unnecessary to pursue this head of inquiry. He certainly could not be acquitted of moral obliquity if party to a fraudulent statement; but it is said he has so grossly neglected his duty as a director, that though he may not have known the true state of the facts, he ought to have known them, and his breach of duty in that respect renders him liable. In order to see how far this obligation is made out, it is necessary, to consider what the business of the company was, and what was the position of Mr. John Cory in relation to it.

My Lords, I think it is idle to talk in general terms of the duty of a director to look after the concerns of the company of which he is one of the managers without seeing what in the ordinary course of business he ought to do or to have done. Now, there are some things which, of course, must be, or at all events ought to be, ap-

parent to any one responsible for the conduct of a commercial business, and one may apply that observation to the business of which we are speaking, namely, a banking business; but I do not understand that any one has suggested that there was neglect or default by reason of the absence of some system under which, if honestly carried out, the interests of the bank would have been in that respect secured.

It is admitted that "the company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks, each with its own manager. The course of business was this: each branch manager sent weekly to the head office what is called a 'weekly state'—i. e., an account shewing how the assets and liabilities of the branch stood, what advances or overdrafts had been made or allowed, and to whom, what securities the bank held, and other matters. Every quarter each branch manager made a more formal return to the head office shewing the position of the branch and the business done during the past quarter. It was the duty of the general manager to examine these documents and to report to the board anything disclosed by them which required their attention. The weekly states or quarterly returns were in the board room for reference in case of need, but unless attention was called to them the directors did not think it necessary to examine them. The chairman of the directors was Mr. Thomas Cory, a brother of Mr. John Cory. The chairman and the general manager (Mr. Collins) visited each branch bank every year; and in addition, two skilled inspectors frequently went round and inspected the accounts and reported to the general manager. The accounts of the branch banks appear, however, not to have been separately audited by professional accountants. The auditors employed to examine the company's accounts, and to certify the annual balance-sheets and accounts laid before the shareholders, only saw the head office books, and the returns from the branch offices certified by their respective managers to the head office. These certified returns formed part of the weekly states, but omitted much that they contained. The minutes of the directors' meetings shew that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board either by the chairman or by the general manager. Mr. John Cory stated in his affidavit the general course of business at board meetings, and his cross-examination does not substantially differ from the account he there gives." See statement taken from the judgment of the Court of Appeal, [1899] 2 Ch. 635, 636, 664, 665.

But it is suggested that Mr. Cory is responsible because this and other portions of the system were not faithfully adhered to. And indeed what is really made the test of his responsibility is that he did

not find out what was fraudulently withheld from his knowledge. So the warning letters of the auditor which were never suffered to reach him are suggested as warnings to him which he ought not to have neglected.

Again, the insufficient striking out of bad and doubtful debts by which it is alleged that the amounts paid in dividends to himself and other directors as well as shareholders are by a process of reasoning and calculation assumed to be payments out of capital. These things are all assumed to have been done as though done with knowledge and intention while at the same time the admission is made that there was no evil mind or conscious fraud.

Now I think such things, if done with evil mind and intention, would be fraud, and it comes back again to the proposition that the responsibility must be based upon the assumption that Mr. Cory is responsible because he did not find out the fraudulent knaves by whom he was surrounded. One was his own brother, another was the general manager; and once I arrive at the conclusion that there were those about him whose interest and object was to deceive him, I certainly do not think that the things which were designedly concealed from him are things which ought to be relied upon as matters for which he was responsible. In the view I take, the whole of the evidence which is relevant and important to the question, did Mr. Cory knowingly permit the things to be done which were done, becomes to my mind entirely immaterial if one is to start with the assumption that he knew nothing about them.

Dealing with the several heads of charge as they have been formulated in the judgment of Wright, J., namely, negligence, breaches of trust in respect of advances made contrary to the said articles of association, and payment of dividends out of capital, I think each and all of them may be disposed of by the proposition that Mr. Cory was not himself conscious of any one of these things being done, and that unless he can be made responsible for not knowing these things, and, as Wright, J., put it, he is shewn to have exhibited a complete neglect of the duties he had undertaken, the charges are not made out.

The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairman were all

alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers—and the theory of his being free from moral fraud assumes under the circumstances that he was—there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business; and so of the rest. If the state and condition of the bank were what was represented, then no one will say that the sum paid in dividends was excessive.

If I assume, as I do, that Mr. Cory acted upon representations made to him which he believed and which came from the officers of the bank, to whom he was, in my judgment, justified in giving credit, the discussion of whether the dividends actually paid were or were not properly divisible has no bearing on Mr. Cory's liability, and I am very reluctant to give any opinion upon it inasmuch as the question may arise, when it may be necessary to decide it. I deprecate any premature judgment.

My Lords, I am, as I have said, very reluctant to enter into a question which for the reasons I have given does not arise here, and into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should be supposed to adopt a course of reasoning as to which I am not satisfied that it is correct. I doubt very much whether such questions can ever be treated in the abstract at all. The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question what may be treated as profits and what as capital. Even the distinction between fixed and floating capital, which may be appropriate enough in an abstract treatise like Adam Smith's "Wealth of Nations," may with reference to a concrete case be quite inappropriate.

It is easy to lay down as an abstract proposition that you must not

pay dividends out of capital; but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire as I have said, not to express any opinion, but as an illustration of what difficulties may arise the example given by the learned counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnership, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin; on the other hand, companies cannot at their will and without the precautions enforced by the statute reduce their capital. But what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete case we must deal with them but until they do I for one decline to express an opinion not called for by the particular facts before us, and I am the more averse to doing so, because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a Court of Law.

I move that this judgment be affirmed, and this appeal dismissed with costs.[12]

ABERDEEN RY. CO. v. BLAKIE BROS.

(House of Lords, 1854. 1 Macqueen, 461.)

The action was by Messrs. Blakie, iron-founders in Aberdeen, against the Railway Company for performance of a contract whereby the Company had agreed to purchase and accept from Messrs. Blakie certain iron chairs, which they were to manufacture for the Company at the rate of £8. 10s. per ton. The summons concluded for implement of the contract or for damages.

The principle defence was, that Mr. Thomas Blakie, the managing partner of the Pursuers, was at the time of the contract a Director, and indeed Chairman, of the Railway Company, and so incapacitated from dealing in that character with his own firm.

The Court of Session held that the Companies' Clauses Consolidation Act (8 Vict. c. 17, §§ 88 and 89) did not nullify the contract, although under it the contractor ceased to be a Director. They therefore decided in favour of the Pursuers. Hence this appeal.[13]

[12] The concurring opinions of Lords Macnaghten and Davey are omitted. Accord: Prefontaine v. Grenier, L. R. [1907] App. Cas. 101.

[13] Statement of facts abridged.

THE LORD CHANCELLOR (Lord CRANWORTH).[14] [After considering the pleadings the court proceeds:]

This, therefore, brings us to the general question, whether a Director of a Railway Company is or is not precluded from dealing on behalf of the Company with himself, or with a firm in which he is a partner.

The Directors are a body to whom is delegated the duty of managing the general affairs of the Company.

A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. See Mr. Hudson's Case, 16 Beav. 485. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

So strictly is the principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the cestui que trust, which it was impossible to obtain.

It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person,—they may even at the time have been better.

But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform.

The principle was acted upon by Lord King in Keech v. Sandford, Select Cases, temp. King, p. 61, and by Lord Hardwicke in Whelpdale v. Cookson, 1 Ves. Sen. 8, and the whole subject was considered by Lord Eldon on a great variety of occasions. It is sufficient to refer from what fell from that very learned and able judge in Ex parte James.

It is true that the questions have generally arisen on agreements for purchases or leases of land, and not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject matter of the agreement, but on the fiduciary character of the contracting party, and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the

[14] A part of the opinion is omitted.

benefit of others, no less than to that of an agent or trustee employed in selling or letting land.

Was then Mr. Blakie so acting in the case now before us?—if he was, did he while so acting contract on behalf of those for whom he was acting with himself?

Both these questions must obviously be answered in the affirmative. Mr. Blakie was not only a Director, but (if that was necessary) the Chairman of the Directors. In that character it was his bounden duty to make the best bargains he could for the benefit of the Company.

While he filled that character, namely, on the 6th of February, 1846, he entered into a contract on behalf of the Company with his own firm, for the purchase of a large quantity of iron chairs at a certain stipulated price. His duty to the Company imposed on him the obligation of obtaining these chairs at the lowest possible price.

His personal interest would lead him in an entirely opposite direction, would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed, and I here see nothing whatever to prevent its application.

I observe that Lord Fullerton seemed to doubt whether the rule would apply where the party whose act or contract is called in question is only one of a body of Directors, not a sole trustee or manager.

But, with all deference, this appears to me to make no difference. It was Mr. Blakie's duty to give to his co-Directors, and through them to the Company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them, he put his interest in conflict with his duty, and whether he was the sole Director or only one of many, can make no difference in principle.

The same observation applies to the fact that he was not the sole person contracting with the Company; he was one of the firm of Blakie Brothers, with whom the contract was made, and so interested in driving as hard a bargain with the Company as he could induce them to make.

It cannot be contended that the rule to which I have referred is one confined to the English law, and that it does not apply to Scotland.

It so happens that one of the leading authorities on the subject is a decision of this House on an appeal from Scotland. I refer to the case of York Buildings Company v. Mackenzie, decided by your Lordships in 1795.

There the respondent, Mackenzie, while he filled the office of "Common Agent" in the sale of the estate of the appellants, who had become insolvent, purchased a portion of them at a judicial auction; and though he had remained in possession for above eleven years after the purchase, and had entirely freed himself from all imputation of fraud, yet this House held that filling as he did an office which made it his duty both to the insolvents and their creditors to obtain the

highest price, he could not put himself in the position of purchaser, and so make it his interest that the price paid should be as low as possible.

This was a very strong case, because there had been acquiescence for above eleven years; the charges of fraud were not supported, and the purchase was made at a sale by auction. Lord Eldon and Sir William Grant were counsel for the respondent, and no doubt everything was urged which their learning and experience could suggest in favour of the respondent.

But this House considered the general principle one of such importance and of such universal application, that they reversed the decree of the Court of Session, and set aside the sale.

The principle, it may be added, is found in, if not adopted from, the civil law. In the Digest is the following passage: "Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores, procuratores, et qui negotia aliena gerunt." Dig. Lib. xviii, t. 1, c. 34, § 7.

In truth, the doctrine rests on such obvious principles of good sense that it is difficult to suppose there can be any system of law in which it would not be found.

It was argued that here the contract ultimately acted on, was not entered into while Mr. Blaikie was Director; for that, though a contract had been entered into in February, yet that contract was afterwards abandoned and new terms agreed on in the following month of June. This, however, is not a true representation of the facts. The contract of February was, it is true, afterwards modified by arrangement between the parties; but this cannot vary the case. If indeed the contracting parties had in June unconditionally put an end to the original contract, so as to release each other from all obligation, the one to purchase, and the other to sell at a stipulated price, the case would have assumed a different aspect. But this was not done. The contract of June was not a contract entered into between the parties on the footing of there being no obligation then binding on them; but an agreement to substitute one contract for another supposed to be binding. Messrs. Blaikie did not say to the Directors in June: We have no binding contract with you, but we are now willing to contract.

What they said amounted in fact to this: We have a contract which was entered into in February, but we are ready, if you desire, to modify it. To hold that this in any manner cured the invalidity of the original contract, would be to open a wide door for enabling all persons to make the rule in question of no force.

It was further contended that whatever may be the general principle applicable to questions of this nature the Legislature has in cases of corporate bodies like this Company modified the rule.

The statute, i. e. the Companies' Clauses Act, it was argued, has impliedly if not expressly recognized the validity of the contract, by en-

acting that its effect shall be to remove the Director from his office; indicating thereby that a binding obligation would have been created, which would render the longer tenure of the office of Director inexpedient; and your Lordships were referred to the case of Foster v. Oxford, Worcester & Wolverhampton Railway Company. That was an action for breach of a contract under seal, whereby the defendants covenanted with the plaintiffs (as in the case now before your Lordships) to purchase from them a quantity of iron. The defendants pleaded that, at the time of the contract, one of the plaintiffs was a Director of their Company, and to this plea there was a general demurrer.

That such a contract would in this country be good at common law is certain. The rule which we have been discussing is a mere equitable rule, and therefore all the Court of Common Pleas had to consider was how far the contract was affected by the statute. The decision was that the statute left the contract untouched, and that its operation was only to remove the Director from his office. The 85th and 86th sections of the English statute 8th and 9th Vict. c. 16, on which the Court proceeded, are in the same words as the 88th and 89th sections of the Scotch statute, and the Counsel at your Lordships' bar relied on this decision as being strictly applicable to the case now under appeal. But there is a clear distinction between them. In Scotland there is no technical division of law and equity. The whole question, equitable as well as legal, was before the Court of Session. All that the Court of Common Pleas decided was that a contract clearly good at law was not made void by an enactment that its effect should be to deprive one of the contracting parties of an office. This decision will not help the Respondents unless they can go further and show that the statute has had the effect of making valid a contract which is bad on general principles, that is to say, principles enforceable here only in equity, but not recognized in our Courts of common law.

I can discover no ground whatever for attributing to the statute any such effect.

Its provisions, however, will still be applicable to the case of Directors who become interested in contracts, as representatives or otherwise, and not by virtue of contracts made by themselves.

I have therefore satisfied myself that the Court of Session came to a wrong conclusion.

I therefore move your Lordships that this Interlocutor be reversed.[15]

[15] Concurring opinion of Lord Brougham is omitted.
See Munson v. S. G. & C. Ry. Co., 103 N. Y. 58, 8 N. E. 355 (1886).

HOFFMAN STEAM COAL CO. v. CUMBERLAND COAL & IRON CO.

(Court of Appeals of Maryland, 1860. 16 Md. 456, 77 Am. Dec. 311.)

Bill to declare null and void certain deeds of lands from the complainant, the Cumberland Coal & Iron Company to Messrs. Sherman and Dean, and the cancellation of a contract, entered into with them by the complainant for the transportation of coal, etc. over a railroad belonging to the latter. The Hoffman Steam Coal Company is a corporation organized by Messrs. Sherman and Dean, subsequent to the conveyance complained of and the grantee of the lands in question from Messrs. Sherman and Dean.

Appeal from an order granting an injunction. The Hoffman Coal Company alone appeals.[16]

LE GRAND, C. J.[17] * * * The first matter of inquiry is, the nature and legal effect of the transactions of Sherman with the Cumberland Coal & Iron Company.

The whole evidence incontestably establishes these facts:

1st. That Sherman was a director of the Cumberland Coal & Iron Company, from the 21st of February 1855, to the 29th of May 1858.

2nd. That, on the 9th of October 1855, on motion of Sherman, a committee was appointed to visit the lands of the company in Maryland, and report on the expediency of selling a portion of them, and of which committee he acted as chairman, and, as the organ of which, he recommended a sale, etc., etc.

3rd. That, on the 22nd of April 1856, Sherman received the deed to himself and Dean for the land, and the contract relating to the transportation over the railroad of complainant.

It thus appears that Sherman was a director in the Cumberland Coal & Iron Company, from the incipiency of the project to dispose of a part of its property down to its consummation, and so remained for more than two years thereafter. He actively participated in all measures tending to the completion of the sale, and, of course, had full knowledge of all the circumstances attendant on its progress. About this the documentary proof allows of not a shadow of doubt.

Under this state of case the question is, whether Sherman was competent to become a purchaser of the property of the plaintiff.

In considering the capacities of a trustee to purchase the property of his cestui que trust, the authorities regard them under two classifications: First, where a trustee buys or contracts with himself, or several trustees, of which he is one, or a board of trustees; second, where the dealing of the trustee is with a cestui que trust, who is sui

[16] Statement of facts abridged.

[17] A part of the opinion is omitted.

juris and competent to deal independently of the trustee in respect to the trust estate.

Whether the transactions of Sherman be considered, under the one or the other head, is immaterial so far as this appeal is concerned, for, in our judgment, in either case, they cannot be upheld if resisted. The distinction between the two classes of cases consists in this: that in the first, the contract is voidable absolutely at the instance of the cestui que trust, without regard to its fairness; whilst in the second, although the presumptions of the law are against the contract, yet permission is given to the trustee, to show the perfect bona fides of the transaction and circumstances relieving it from the censure of the law. This is a distinction recognized in most of the books, but, it is not universally so. So far from it, some of the cases insist with great earnestness, that the governing principle ought to be, and is, the same in both cases. It is not necessary we should investigate the solidity of this last mentioned doctrine; for, whether the dealings of Sherman belong to the one or the other class, they equally fall under the correction of a court of equity.

The necessity of good faith—and that free from suspicion, as far as practicable—between the principal and agent, is the main pillar of support to the doctrine; the necessity of it underlies all the decisions. Remembering the weakness of humanity, its liability to be seduced, by self-interest, from the straight line of duty, the sages of the law inculcate and enjoin, a strict observance of the divine precept: "Lead us not into temptation."

In this State, as elsewhere, it is well settled that trustees cannot purchase at their own sales, either directly or indirectly, and if they do, such purchase will be set aside, on the proper and reasonable application of the parties interested. Richardson v. Jones, 3 Gill & J. 184, 22 Am. Dec. 293. This doctrine, which is applicable to trustees, applies also to purchases by persons acting in any fiduciary capacity, which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property. The authorities supporting it are numerous and uncontradictory; they will be found brought together to a considerable number in the notes to the case of Fox v. Mackreth, 1 White & Tudor's Leading Equity Cases, 105. A director in a company holds such a relation to its stockholders. The House of Lords, in the case of the Aberdeen Railway Company v. Blaikie, 1 Macqueen Rep., 461, held that a contract, entered into by a manufacturer for the supply of iron furnishings to a railway company of which he was a director, or the chairman, at the date of the contract, was invalid, and not enforceable against the company; and Lord Cranworth, in delivering the opinion, said: "A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation, whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal,

and it is a rule of universal application, that no one having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have a personal interest conflicting or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised, as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the cestui que trust, which it was possible to obtain. It may sometimes happen, that the terms on which a trustee has dealt, or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even, at the time, have been better. But still so inflexible is the rule, that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform." The same views are expressed in the case of Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076, a case elaborately discussed by counsel and court. "The rule," say the court "embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the persons with whom he is dealing, or on whose account he is acting, and his own individual interest."

These citations are sufficient to show, that the dealings of the defendant, Sherman, with the property of the complainant, fall directly within the prohibition of the rule, and, as a consequence, obnoxious to disavowal.

But, it is said, however, this may be, the whole transaction was fully ratified and confirmed by the complainant, which ratification and confirmation relieved it from all legal infirmity. An attentive consideration of its whole history, as detailed in the record, has not brought us to this opinion. The law governing questions of ratification, in cases like the present, is well settled. To render the act of ratification effective and conclusive, certain considerations are necessary. At the time of the supposed ratification, the principal must have been fully aware of every material circumstance of the transaction, the real value of the subject of the contract, and his act of ratification must have been an independent and substantive act, founded on complete information, and of perfect freedom of volition. And, in addition to all this, the cestui que trust must not only have been acquainted with the facts, but apprised of the law, how those facts would be dealt with if brought before a court of equity. Lewin on Trusts (Ed. of 1858) p. 615.

This last requisite, it is nowhere shown in the proof, has been complied with. But, on the contrary, it is fairly to be inferred that the stockholders believed they were concluded by what had been done, and this inference is particularly strengthened by the circumstance, that the modification in the contract of transportation was solicited and granted, not as a matter of right, but as a concession on the part of

the beneficiaries under it. In this view, it is not necessary we should dwell more fully on the other facts attending the negotiation and sale. Such commentary properly belongs to the final hearing.

As to Dean, it is only necessary to observe, that it is impossible to believe he was ignorant, when he became associated in the transaction, of the fact that Sherman was a director in the Cumberland Coal & Iron Company. We cannot suppose him to have become a party to a contract, involving enormous sums of money and great liabilities; without some knowledge of the existence and organization of the corporation, with which he was dealing to so great an extent. Imputing to him the possession of ordinary intelligence, and judging of his transactions by the rules which usually influence human conduct, when taken in connexion with all the facts and circumstances surrounding him, we are led to the conclusion, that he had knowledge of the relation which Sherman bore to the Coal & Iron Company, and is, therefore, affected with whatever of legal disability belonged to Sherman, by reason of that relation.

But it is urged that however defective the title of Sherman and Dean may, under the circumstances, have been, the title of the Hoffman Steam Coal Company of Allegany is, nevertheless, good and free from blemish, it having been acquired bona fide and without notice.

In view of the facts of this case, it is immaterial to inquire, what would be the principles applicable to a case in which the defendant had, in point of fact, become possessed of title bona fide, and without notice of the circumstances impairing that claimed by those from whom it was derived. The facts of this case are too palpable to allow of conjecture; and they all show that, whatever knowledge Sherman had, must have been possessed by the Hoffman Steam Coal Company of Allegany county. This company was incorporated under the act of 1852, on the 19th of August, 1858, and, on the day following, the deed was made to it in pursuance, clearly, of one entire plan. Sherman and Dean becoming the owners of 4996 of the 5,000 thousand shares, into which the capital stock was divided; it was, in fact, but a contrivance, whereby the same property was held by the same parties, but under a different name. The testimony of Shoemaker shows, that his ownership of one share was unreal; that he never did pay for it, and that his participation in the organization of the company was merely to oblige other parties, towards whom he held friendly relations; and, notwithstanding the statement of Postly to the contrary, it is no violent presumption, that others, whose names were used in the organization of the company, occupied the same relation to it as did Shoemaker. If the facts of this case were deemed insufficient to establish notice, then, it is difficult, if not absolutely impossible, to imagine a combination of circumstances adequate to such a result. The whole case shows, that in the early stages of the existence of the appellant so far as its property and transactions were concerned, it

and Sherman were one and the same. In conveying to the Hoffman Company he was but conveying to himself.

It appears, from the evidence, that some of the shares in the stock of the Hoffman Steam Coal Company were held by other persons than Sherman and Dean, prior to the sixth day of December 1858, the date of the filing of the original bill, and, it is contended, that as to them, they being bona fide holders without notice, the objections urged against Sherman and Dean are not applicable. There is no doubt that where a purchaser, with notice from a trustee, conveys for valuable consideration to another person, who has no notice of the trust, the estate will not be affected with the trust in the hands of the second purchaser. Hill on Trustees, 516 (marginal). But, as to shareholders so situated, there is no question presented by this appeal. It is only as to the right of the appellant to ask a reversal of the order of the court, that we are now called upon to decide. We need not, therefore, look into the testimony for the purpose of discovering what number, if any, shares of stock were held by innocent parties before the filing of the bill.

We think the objections to the sufficiency of the bills of complaint were properly disposed of by the judge of the Circuit Court. The charge of fraud is made specifically, and the invalidity of the deeds given subsequently to that of the 22nd of April 1856, is assailed on the same ground as is that.

We are of opinion there is an abundance in the case, as now made, to justify the continuance of the injunction until final hearing, and we accordingly affirm the orders of the Circuit Court of the 25th day of May 1859, refusing to dissolve the injunction, and, also, the order of the third day of October 1859, overruling the motion, made by the appellant, to dissolve the injunction. Orders affirmed.[18]

TWIN-LICK OIL CO. OF WEST VIRGINIA v. MARBURY.

(Supreme Court of the United States, 1875. 91 U. S. 587, 23 L. Ed. 328.)

MILLER, J.[19] The appellant here, complainant below, was a corporation organized under the laws of West Virginia, engaged in the business of raising and selling petroleum. It became very much embarrassed in the early part of 1867, and borrowed from the defendant the sum of $2,000, for which a note was given, secured by a deed of trust, conveying all the property, rights, and franchises of the corporation to William Thomas, to secure the payment of said note, with the usual power of sale in default of payment. The property was

[18] Concurring opinion of Eccleston, J., is omitted.
See Cumberland Coal & Iron Co. v. Sherman et al., 30 Barb. (N. Y.) 553 (1859).

[19] A part of the opinion, dealing with laches, is omitted.

sold under the deed of trust; was bought in by defendant's agent for his benefit, and conveyed to him in the summer of the same year. The defendant was, at the time of these transactions, a stockholder and director in the company; and the bill in this case was filed in April, 1871, four years after, to have a decree that defendant holds as trustee for complainant, and for an accounting as to the time he had control of the property. It charges that defendant has abused his trust relation to the company, to take advantage of its difficulties, and buy in at a sacrifice its valuable property and franchises; that, concealing his knowledge that the lease of the ground on which the company operated included a well, working profitably, and by promises to individual shareholders that he would purchase in the property for the joint benefit of the whole, he obtained an unjust advantage, and in other ways violated his duty as an officer charged with a fiduciary relation to the company.

As to all this, which is denied in the answer, and as to which much testimony is taken, it is sufficient to say that we are satisfied that the defendant loaned the money to the corporation in good faith, and honestly to assist it in its business in an hour of extreme embarrassment, and took just such security as any other man would have taken; that when his money became due, and there was no apparent probability of the company paying it at any time, the property was sold by the trustee, and bought in by defendant at a fair and open sale, and at a reasonable price; that, in short, there was neither actual fraud nor oppression; no advantage was taken of defendant's position as director, or of any matter known to him at the time of the sale, affecting the value of the property, which was not as well known to others interested as it was to himself; and that the sale and purchase was the only mode left to defendant to make his money.

The first question which arises in this state of the facts is, whether defendant's purchase was absolutely void.

That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. Koehler v. Iron Co., 2 Black, 715, 17 L. Ed. 339; Drury v. Cross, 7 Wall. 299, 19 L. Ed. 40; Railroad Co. v. Maquay, 25 Beav. 586; Cumberland Co. v. Sherman, 30 Barb. (N. Y.) 553; Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 16 Md. 456, 77 Am. Dec. 311. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say, this is the general rule: for there may be cases where such contracts would be void ab initio; as when an agent to sell buys of himself, and by his

power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principal may validate the sale.

The present case is not one of that class. While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given.

There are in such a transaction three distinct parties whose interest is affected by it; namely, the lender, the corporation, and the stockholders of the corporation.

The directors are the officers or agents of the corporation, and represent the interests of that abstract legal entity, and of those who own the shares of its stock. One of the objects of creating a corporation by law is to enable it to make contracts; and these contracts may be made with its stockholders as well as with others. In some classes of corporations, as in mutual insurance companies, the main object of the act of incorporation is to enable the company to make contracts with its stockholders, or with persons who become stockholders by the very act of making the contract of insurance. It is very true, that as a stockholder, in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders, who, with him, constitute the whole of that artificial entity, he is properly held to a larger measure of candor and good faith than if he were not a stockholder.

So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness. All this falls far short, however, of holding that no such contract can be made which will be valid; and

we entertain no doubt that the defendant in this case could make a loan of money to the company; and as we have already said that the evidence shows it to have been an honest transaction for the benefit of the corporation and its shareholders, both in the rate of interest and in the security taken, we think it was valid originally, whether liable to be avoided afterwards by the company or not.

If it be conceded that the contract by which the defendant became the creditor of the company was valid, we see no principle on which the subsequent purchase under the deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted, and who in this respect was the trustee of the corporation, and must be supposed to have been selected by it for the exercise of this power. Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for, if he could not bid, he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money. We think the sale was a fair one. The company was hopelessly involved beside the debt to defendant. The well was exhausted, to all appearance. The machinery was of little use for any other purpose, and would not pay transportation. Most of the stockholders who now promote this suit refused to pay assessments on their shares to aid the company. Nothing was left to the defendant but to buy it in, as no one would bid the amount of his debt. * * * Decree affirmed.

SCHNITTGER v. OLD HOME CONSOL. MINING CO. et al.

(Supreme Court of California, 1904. 144 Cal. 603, 78 Pac. 9.)

HARRISON, C. The Old Home Consolidated Mining Company is a corporation organized under the laws of this state, and having a board of five directors, who, at the times herein considered, were John McKewen, George T. Emery, Walter McG. Logan, F. Hahn, and C. W. Weld. August 16, 1897, it executed to the plaintiff's assignor its promissory note for $5,000, payable two years thereafter, with interest at the rate of 1 per cent. a month, and at the same time, for the purpose of securing its payment, executed a mortgage upon certain mining property within this state. The promissory note was also indorsed by each of its directors. The execution of the mortgage was duly authorized by a vote of more than two-thirds of its stockholders at a meeting called for that purpose. Prior to its maturity the note was assigned to the plaintiff. Interest on the note was paid by the corporation up to August 16, 1901. October 8, 1901, the present action was brought against the corporation and C. W. Weld and Walter McG. Logan, two of the indorsers, to recover the amount

of the note, and for a foreclosure of the mortgage. The action was defended upon the ground that the money for which the promissory note was given and the mortgage executed was the money of and furnished by the directors Hahn and McKewen; that they are the real parties in interest in the transaction, and that they entered into it for the purpose of foreclosing the mortgage and obtaining the property of the corporation; that in so doing they violated their duties as trustees, and that for this reason the note and mortgage were void.

Upon the trial of the cause the court found that the corporation defendant had received the $5,000 for which its promissory note and mortgage had been executed, and that the transaction was thereafter ratified by the vote of more than two-thirds of its stockholders; that the money loaned to it was in fact the money of the directors Hahn and McKewen, and that they are the real parties in interest in the note and mortgage; that the note was made in the name of Helene Mayer; that the note and mortgage were given to and in her name with the purpose and object on the part of said Hahn and McKewen to obtain control of the property of the corporation; that the assignment from her to the plaintiff herein was not a bona fide transaction; that the name of the plaintiff was inserted in said assignment in order to cover up the interest of said Hahn and McKewen, and to give it the appearance of an actual bona fide transaction; that at the meeting of the board of directors of the defendant corporation at which the loan was authorized all of the directors were present, and that Hahn and McKewen participated therein; that at that meeting it was stated to the board by the attorney of Helene Mayer that the loan could be obtained from her, and that the directors other than Hahn and McKewen believed that the money would be furnished by her; that Hahn and McKewen did not at that meeting or at any other time state from whom the loan was to be obtained. The court also found that interest had been paid upon the note up to August 16, 1901, and that since that date no interest had been paid, and held that the plaintiff is entitled to no further interest.

Upon these findings the court held that the plaintiff was entitled to judgment against the defendants for the sum of $5,000, without any interest thereon, together with $300 as counsel fees, and $100 for costs of receiver, and for a decree of foreclosure against the defendant corporation, and sale of the mortgaged property to satisfy said amount. From the judgment thus entered the defendants have appealed upon the judgment roll alone without any bill of exceptions.

The appellants do not question the sufficiency of the evidence to sustain the findings of the court, or claim that the evidence before the court would have authorized any further or different findings, but urge in support of their appeal, that, as Hahn and McKewen were directors of the corporation defendant, their relation to the corporation and to its stockholders was that of trustees, and that by virtue

of that relation the transaction in which the loan was made to the corporation was void.

A director of a corporation, like any other trustee, is bound to act in the utmost good faith toward his beneficiary (Civ. Code, § 2228), and is forbidden to take part in any transaction concerning the trust in which he has an interest adverse to that of his beneficiary (Civ. Code, § 2230); but he is not absolutely precluded from dealing directly with the corporation of which he is a director. Any transaction between them is subject to rigid scrutiny, and is voidable at the instance of the beneficiary for any violation of his duty as trustee, but is not ipso facto void. "The mere fact that the creditor was a director of the company does not render the transaction fraudulent. There is nothing which forbids either members or directors of a corporation from making contracts with it like any other individual, and when the contract is made the director stands as to the contract in the relation of a stranger to the corporation." Stratton v. Allen, 16 N. J. Eq. 229. Mr. Thompson says (3 Thompson on Corp. § 2068): "We therefore find the prevailing doctrine to be that the director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor; but always subject to severe scrutiny, and under the obligation of acting in the utmost good faith." See, also, Taylor on Corp. § 634; Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291, and note; Santa Cruz R. R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Sutter St. R. R. Co. v. Baum, 66 Cal. 44, 4 Pac. 916; Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98; Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749.

The question presented upon this appeal does not involve the validity of a transaction in which the director of a corporation has executed a contract on behalf of the corporation in which he is personally interested, without any previous authority of the corporation, or where the resolution authorizing its execution depended upon his vote therefor. The transaction was had under the authority of the corporation, given at a meeting of the board of directors, at which all were present; and, although the court finds that at that meeting Hahn and McKewen "were present and participated therein," it does not find that they voted upon the proposition for the loan. But, even if they had voted for it, the transaction would not have been thereby vitiated, inasmuch as the votes of the other three members of the board were sufficient to make the resolution effective. Porter v. Lassen Co., etc., Co., 127 Cal. 261, 59 Pac. 563. It was not a fraud upon the corporation, or upon the other members of the board, for these directors not to disclose the fact that they were the real parties who were loaning the money, or that the person in whose name the transaction was had was merely a figurehead. It was no violation of their duty as trustee to loan the money in the name of another rather than in their own, un-

less it could be shown that thereby the corporation sustained some detriment, or they obtained some undue advantage over the corporation.

The allegation in the answer that Hahn and McKewen procured the loan to be made in the name of Helene Mayer "for the sole purpose at that time to bring suit to foreclose said mortgage, and finally acquire the title to the mining property of said corporation, in violation of their trust," is not found by the court to be a fact, and it must be assumed that there was no evidence tending to establish that allegation. The finding that the money was loaned and the note and mortgage given in her name "with the purpose and object on the part of said Hahn and McKewen, and both of them, of obtaining control of the property of said corporation," does not entitle the corporation to avoid its agreement and retain the money. Whatever may have been the underlying motive for entertaining this purpose, the corporation was in no respect injured thereby. They could obtain control of the mortgaged property only through a sale at public auction under a decree of foreclosure. If they should become the purchasers at such sale, the property would still be subject to redemption either by the corporation, or, in its behalf, by any of its stockholders. Wright v. Oroville M. Co., 40 Cal. 20. The transaction was not concealed from the stockholders. The resolution authorizing it was spread upon the records of the corporation. Hahn and McKewen, as well as the other directors, indorsed the note, and the note and mortgage were recorded in the county recorder's office, and thereafter the stockholders ratified the transaction.

The judgment should be affirmed.

The notice of appeal also purports to include an appeal from an order of the court made after the judgment ordering a sale of the property mortgaged, but, as the record contains no bill of exceptions in which this action of the court is presented, the order appealed from should also be affirmed.

COOPER and GRAY, CC., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: SHAW, ANGELLOTTI, and VAN DYKE, JJ.

BURLAND v. EARLE.

(Privy Council, 1902. L. R. App. Cas. 83.)

The judgment of their Lordships was delivered by Lord DAVEY.[20] * * * The next matter to which the appeal relates is the sale to the company by Burland of the lithographic plant, etc., of the Burland Lithographic Company. It appears that that company had been carrying on business in Montreal, and, having become insolvent, was wound

[20] Statement of facts omitted. A part of the opinion only is given.

up under the provisions of the Winding-up Act. Burland was interested in the company as a stockholder and a creditor. At the public sale by the liquidator on May 10, 1892, Burland bid for and purchased all the assets of the company in four lots. The price paid by him for lot 1 was $21,564, and he shortly afterwards sold the property comprised in that lot to the appellant company for $60,000. The property, together with some other plant purchased from another company, was subsequently sold to a company formed for the purpose at an enhanced price payable in shares, which were distributed as a bonus amongst the shareholders of the company.

In these circumstances Burland had been ordered to pay to the company the sum of $38,436, being the amount of the profit realized by him on the resale. Both Courts have held that the resale was by Burland's advice and influence, and was made without disclosing to the company the price at which he had purchased. It was also held in the Court of Appeal that Burland had bought the property with the intention and for the purpose of reselling it to the company. It appears from the evidence of the respondent Earle, who was then the next largest shareholder to Burland and a director, that he was present at the sale and knew all about the transaction, and from the evidence of Gillelan that he knew what Burland had paid "very shortly after." There was evidence of two witnesses, Reinhold and Monk, that the price to the company was not unfair. But their Lordships do not think it necessary to pursue these topics, because they are of opinion that the relief prayed by the amended statement of claim, and granted in the Courts below, is altogether misconceived. There is no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee for the company of the purchased property. It may be that he had an intention in his own mind to resell it to the company; but it was an intention which he was at liberty to carry out or abandon at his own will. It may be also that a person of a more refined self-respect and a more generous regard for the company of which he was president would have been disposed to give the company the benefit of his purchase. But their Lordships have not to decide questions of that character. The sole question is whether he was under any legal obligation to do so. Let it be assumed that the company or the dissentient shareholders might by appropriate proceedings have at one time obtained a decree for rescission of the contract. But that is not the relief which they ask or could in the circumstances obtain in this suit. The case seems to their Lordships to be exactly that put by Lord Cairns in Erlanger v. New Sombrero Phosphate Co. (1878) 3 App. Cas. 1218. In that case the bill prayed for rescission, or alternately for the profit made by Erlanger and his syndicate on the resale to the company. Lord Cairns said, 3 App. Cas. at page 1235: "It may well be that the prevailing idea in their mind was not to retain or work the island, but to sell it again at an increase of price, and very

possibly to promote or get up a company to purchase the island from them; but they were, as it seems to me, after their purchase was made, perfectly free to do with the island whatever they liked, to use it as they liked, and to sell it how and to whom and for what price they liked. The part of the case of the respondents which as an alternative sought to make the appellants account for the profit which they made on the resale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract of August 30, 1871, is not, as I think, capable of being supported; and this, as I understand, was the view of all the judges in the Courts below."

Reference may also be made to the judgments of Pearson, J., and Cotton and Fry, L. JJ., in In re Cape Breton Co., 26 Ch. D. 221, and 29 Ch. D. 795. To rescind the sale is one thing, but to force on the vendor a contract to sell at another price is a totally different thing. * * *[21]

In re NORTH AUSTRALIAN TERRITORY CO.

ARCHER'S CASE.

(Supreme Court of Judicature, 1892. L. R. 1 Ch. Div. 322.)

Summons by the official liquidator of the North Australian Territory Company against Archer, asking that it might be declared that Archer was guilty of a breach of trust in relation to the company entering into an agreement with its promoter for the purchase at par by the promoter from Archer, and at his request of the fifty qualification shares, and that Archer be ordered to pay to the liquidators the £500. so received from the promoter.

This is an appeal from an order of Mr. Justice Kekewich, deciding, in substance, that a gentleman of the name of Archer ought not to be ordered to pay to the company the sum of £500. in respect of money which he is alleged to have received, and to be accountable to the company for, under the 10th section of the Companies (Winding-up) Act, 1890.[22]

BOWEN, L. J.[23] * * * I add some observations on the question that has been argued before us out of respect to the learned Judge below from whom we are differing.

Mr. Archer, the gentleman whose conduct we are considering, was induced by a promoter of the company, who was acting in the interest of the vendor—induced, that is to say, by a person who stood in a fiduciary relation to the company—to become a director. In order to induce him to become a director, the promoter, Mr. Murray Smith,

[21] Contra: Parker v. Nickerson, 112 Mass. 195 (1873).

[22] Statement of facts abridged.

[23] Part of the opinion is omitted.

gave him a promise, afterwards fulfilled, to indemnify him against loss in respect of his shares, a director having to qualify himself by taking shares in the company. The shares, when they were bought by Mr. Archer, were valuable. In the course of time their value fell to nothing; the indemnity was performed, and Mr. Archer emerged from the transaction, not indeed with a profit in one sense, but without loss which otherwise he would have sustained.

Now, what is the true course of reasoning on the subject? As it seems to me it is this: that promise of an indemnity, or that indemnity, as I may call it, was a valuable consideration; it was not money, but it was money's worth, the measure and exact value of which depended upon the future; and events which have since happened shew that the measure and value of that indemnity was £500. The right to the value of that indemnity, whatever might become its value in the future, belonged to the company. The gentleman who was about to become their agent, their director, received it in order to induce him to become a director, and he received it from a person standing in a fiduciary relation to the company. What is the law applicable to this case? It is clear and simple. The company ought to have been told of the existence of the bargain in order that they might elect whether they would let their director keep the advantage or not. If its existence was not disclosed, then, inasmuch, as the indemnity became fruitful, the money which arose from it became money for which the director who had kept it secret was bound to account to the company. That seems to me to be the law; and, differing as I do from the learned judge whose judgment is under consideration, I cannot see that it can be rightly said there was no loss to the company. It is perfectly true that, in one sense, there was no loss; but in another sense there was. The loss was that the company did not get that benefit from the indemnity which ought to have been theirs, but that somebody else got it. They did not have accounted for to them the value of this indemnity as soon as it became valuable. They ought to have had it accounted for, and the non-accounting for it was, in my opinion, a misfeasance.

That conclusion I take to be good in law; but is it not good sense as well as good law? A promoter who is acting in the interest of a vendor is forming a company. The company is formed with articles of association under which a director is to be qualified by holding and paying for fifty shares. What is the object of such a clause? Amongst others, that the company shall have the security of this, that the director has a stake in the concern while he is acting as director, and that he shall not be simply in the position of a person who can, without loss to himself, play ducks and drakes with the company's property. It is so far a shield to the company. Yet the promoter who is promoting the company indemnifies the director against any loss on those shares; that is to say, he destroys by such an agreement an important element which guarantees the company for the vigilance of

their director. The director of a company is placed upon the board in order that he may, among other duties, as it appears to me, watch the proceedings of the promoter who is acting as agent for the vendor. Is it lawful, is it tolerable, either in equity or in law, that a promoter should be at liberty to have a director in his pay? Certainly not. But he is really having the director in his pay if he is guaranteeing the director against loss in respect of shares which the director is bound to hold in order to qualify himself under the articles. As I said during the argument, the director is really a watch-dog, and the watch-dog has no right, without the knowledge of his master, to take a sop from a possible wolf.

The case seems to me to be clear; but the point was taken by Mr. Butcher, with his usual ingenuity, that there was no evidence here of non-disclosure to the directors of the receipt of this promise of indemnity. That is a point which would have deserved attention if the case were being tried in the first instance, because the onus of proving misfeasance rests with those who desire to prove it. But in this case we have the facts illuminated by the light of the letters which have passed between Mr. Archer and Mr. Murray Smith. In giving the promise of indemnity Mr. Murray Smith did so upon the terms that there should be no disclosure of what had been done. Mr. Archer, who took the indemnity on those terms, must, as an honest man, be taken to have carried them out. He does not repudiate the terms of Mr. Smith; he accepts the indemnity and acts upon it. There is not a trace in the correspondence of any disclosure to the Board; and when Mr. Archer goes into the box and is examined, he does not suggest to his counsel, nor does his counsel suggest to him, that there ever was a disclosure of this indemnity—a transaction which, it was agreed in the first instance, should be buried in silence. It would be puerile, in my opinion, to allow a case clear in law against Mr. Archer to be defeated upon the ground that there is here no evidence of non-disclosure. Having regard to the conduct of the case at the trial and to the correspondence, there is evidence of non-disclosure enough to justify any Court in feeling perfectly safe in acting upon it. I, at all events, have no hesitation in deciding that point against Mr. Archer, and I think, for the reasons that have been given by my learned Brother, that the case of Bentinck v. Fenn, 12 App. Cas. 652, has no application. I, therefore, agree that the appeal must be allowed.[24]

[24] The concurring opinions of Lord Justices Lindley and Fry are omitted. See Pikes Peak Co. v. Pfuntner, 158 Mich. 412, 123 N. W. 19 (1910).

SECTION 2.—REMEDIES AGAINST DIRECTORS

BAYLESS v. ORNE et al.

(Superior Court of Chancery of Mississippi, 1843. Freem. Ch. 161.)

THE CHANCELLOR (BUCKNER).[25] This bill is filed by the complainants as three of the stockholders of the Hernando Railroad & Banking Company, against Orne and Bybee, as a president and cashier, and against Hallett, Brown and others, as a portion of the stockholders in said company. The bill charges that the defendants, Orne and Bybee, are incompetent and unfit persons to have charge of the affairs of said company, and charges them with various acts of abuse and delinquency in their official conduct, in misapplying the funds of the company and otherwise mismanaging its affairs. The bill prays for an injunction, which was granted, restraining the said Orne as president, and the said Bybee as cashier, from the exercise of their official functions as officers of said company. It also prays for the appointment of commissioners to take charge of the effects of the bank, of whatsoever character, and that the affairs of said bank "be finally settled up and closed—that an account be taken between the stockholders, etc." * * * The case was submitted by agreement upon the bill and answers of two of the defendants, and upon exceptions thereto as upon a demurrer of the other defendants. * * *

I entertain no doubt that this court has jurisdiction at the instance of stockholders to call the directors of a monied or other joint stock corporation to account for any abuse of trust or waste or misapplication of the funds of the company. But in such case the jurisdiction is over the directors personally, and not over the corporation. Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212.

The directors of an aggregate corporation, who are charged with the control and direction of its affairs, become the agents and trustees of the corporation, and in their trust character may be held accountable in this court, at the instance of the stockholders, for dereliction of duty or fraudulent breach of trust. Verplanck v. Mercantile Insurance Company, 1 Edw. Ch. (N.Y.) 84.

In such case it is the trust relation which gives jurisdiction to the court; and chancellor Kent said, to his plain and ordinary head of equity the jurisdiction of chancery over corporations ought to be confined. Attorney General v. Utica Insurance Company, 2 Johns. Ch. (N. Y.) 388. But such relation does not exist between the stockholders and the corporation itself, nor between different sets of

[25] Facts sufficiently stated in the opinion, a part of which is omitted.

stockholders of the same company. The relation of trustees and cestuis que trust requires separate and distinct persons to constitute it, whereas the stockholders of an incorporated company are one and the same. Their individuality is merged in the artificial person of which they are component parts. Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84.

In the case now before me the bill is filed by the complainants, as stockholders, against Orne and Bybee as president and cashier, enjoining them from the exercise of their official functions, and for an account of alleged misuse of monies, and against the other defendants as stockholders of the Hernando Rail Road and Banking Company. So far as the defendants Brown and others are concerned, as joint stockholders with the complainants, it is obvious, from what has been already said that there is no ground for entertaining the bill; for as between them the trust relation which gives jurisdiction does not exist. This disposes of the case as to the defendants, who are made such upon no other ground than that of their being stockholders in said company.

The next inquiry is, can the suit be sustained by the complainants, as stockholders, against the defendants Orne and Bybee, for the purpose of compelling an account for monies used or misapplied by them as president and cashier of said company. I think it may be laid down as a general rule, that suits brought for the purpose of compelling the ministerial officers of a private corporation to account for breach of official duty or misapplication of corporate funds, should be brought in the name of the corporation. Such officers are directly amenable to the directors of the company, who are charged with the protection and management of its affairs, and who direct its corporate action. Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212. This rule might be dispensed with if it were alleged and made to appear that the directory of the corporation connived at the delinquency or misconduct of its officers, or refused to bring them to account by suit. In such case, the stockholders as the real and ultimate parties in interest would be permitted to bring suit directly in their own names. (Ib.) I think, then, that the objection for want of proper parties is well taken. So far as the case depends upon the injunction granted against the aforesaid officers of the company, I am unable to perceive anything in it which warrants the jurisdiction which was assumed for that purpose.

Every corporation has within itself the power of guarding against any apprehended or threatened abuse of its ministerial officers. The right of amoving an officer of a private corporation, without any express provision for that purpose, is considered an inseparable incident of corporate powers. Ang. & Ames on Corp. 58. And such right of amotion may be exercised when gross delinquency or other misconduct of officers indicates the necessity and propriety of such

action. This right of removal for breach of duty applies as well to officers whose office is of the essence of the corporation, (such as the directors of a corporate company,) as to those who are mere executive agents. But a material distinction exists between the first class of officers and those whose duties are merely ministerial, such as the cashier and other executive officers of a bank, who are usually appointed durante bene placito, and may be removed without any other cause than that of its being the pleasure of those who appointed them. In such case it is said the right to amove is, of course, incident to the right of appointment, Ang. & Ames, Corp. 247, and I take it for granted that such officers may be amoved for cause, even where the tenure of office is fixed for a definite period.

It may be said that the bill in this case does not ask a removal of the officers; but I conceive an injunction indefinitely suspending an officer, is in its character so near akin to an absolute removal, as to defy any sound distinction between the two modes of accomplishing the same thing. The right of amoving the officers of a private corporation belongs exclusively to the corporation itself; this court has no jurisdiction or power for such purpose. In the case of Attorney General v. Earl of Clarendon, 17 Ves. 491, it was distinctly laid down by the master of the rolls, that chancery had no jurisdiction with regard to the amotion of corporators of any description. If this be true, it would seem to follow that this court cannot by its injunction suspend a corporator or officer from the exercise of their corporate or official privileges, and thus do indirectly that which may not be done directly. It may be again repeated that a court of equity has no general jurisdiction over corporations or corporators, except so far as the transaction may assume the character of a trust, and place the parties in the relation of trustees and cestuis que trust.

The principles of this case are new in this state, and I have regretted that I have been compelled to throw these views together somewhat hastily, rather as furnishing some of the reasons which have influenced my mind, than as a thorough and finished view of the subject.

The demurrer must be sustained, the injunction dissolved and the bill dismissed.[26]

DYKMAN v. KEENEY et al.

(Court of Appeals of New York, 1897. 154 N. Y. 483, 48 N. E. 894.)

GRAY, J.[27] This action is brought by the receiver of the Commercial Bank against certain persons, who either were formerly di-

[26] Accord: Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508 (1860); Robertson v. Bullions, 11 N. Y. 243 (1854).
See Imperial, etc., Hotel Co. v. Hampson, L. R. 25 Ch. D. (1882).

[27] Facts stated in the opinion, a part of which is omitted.

rectors of the bank, or who are the personal representatives of deceased directors. The complaint alleges that these directors were such between April, 1886, and August, 1893; some during all of that period of time, and others during varying periods of time between those dates. It charges the defendants, during the several periods while they were in office, with conduct which was negligent, wasteful, and in violation of the statute in many respects, and the result of which was to effect the ruin of the bank. * * *

One of the defendants has demurred to the complaint, upon the grounds that there was an improper joinder of causes of action, and that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled at the special term, and, upon appeal to the appellate division, there was an affirmance of the special term judgment. An application for leave to appeal was granted by the appellate division, and two questions of law were certified for review by this court, viz. whether the complaint in this action sets forth a cause of action in equity; and, second, whether there has been an improper joinder of causes of action in the complaint herein.

I think that the present appeal is controlled by our disposition of the case of O'Brien v. Fitzgerald, 150 N. Y. 572, 44 N. E. 1126. That, like this, was an action brought by receivers of a bank to recover against its directors for the negligent performance of their duties, and the demurrer to the complaint raised a similar question to that now before us. When that case first came before this court (143 N. Y. 377, 38 N. E. 371) we all concurred in the opinion that the demurrer should be sustained. Judge Finch, who delivered the opinion of this court, observed that, on its face and in its form, the action was one at law, to recover damages for negligence, and that no facts were stated which indicated a need of the intervention of a court of equity. He pointed out several respects in which the complaint was wanting in proper averments to make out an equitable cause of action, and he concluded that, while the formal demand of relief is not decisive of the legal or equitable character of the action, yet the demand for a money judgment therein was consistent with a perfect cause of action in the complaint to recover damages at law. * * *

It is very clear, therefore, that we are committed by our decision in O'Brien v. Fitzgerald to the view that where the action is to hold persons responsible to the receiver of a corporation for a neglectful and wrongful performance of their duties as directors, and to recover the losses sustained by the corporation, the action is one at law, and that something more is required to warrant the intervention of a court of equity than mere allegations showing that the acts complained of are numerous and complicated; that they are difficult of ascertainment, without a discovery with respect to them; and that a multiplicity of actions would be necessary if all the directors who

were in office during the whole or a part of the time within which the acts complained of were committed could not be associated as defendants in one action.

While some observations of Judge Finch, when the case of O'Brien v. Fitzgerald was first before us, have been pointed out, as indicating that such an action might lie in equity, they were made with respect to the case appearing by the complaint before him, and it is very clear from his opinion that he entertained a grave doubt as to whether an equitable action could be at all supported upon the facts pleaded. His expression as to that was as follows: "My doubt about that is very grave, although I leave the question open." Again the doubt appears, when, after remarking that some cases seem to allow the remedy of a suit in equity by a corporation against its directors to recover losses, he says: "Granting that, and granting also what I am not now ready to admit as the law of this state that the facts pleaded in the present case are sufficient to support the action as an equitable one, we are left by the pleader in a doubt which can only be solved by recurring to the demand for relief." The question was therefore left an open one, and was met upon the second demurrer to the amended complaint in O'Brien v. Fitzgerald. It is again here in even a stronger form.

That an action in equity will lie by a stockholder against the directors of his corporation for violations of their duties or breaches of the trust committed to them, is well settled and as recently asserted as in the case of Brinckerhoff v. Bostwick, 88 N. Y. 52; Id., 105 N. Y. 567, 12 N. E. 58. But, as it was observed by Judge Finch in the opinion referred to, there is a wide and vital difference between such a case and one where the action is by the corporation against its delinquent directors. Quite lately the case of Bank v. Beard, 151 N. Y. 638, 45 N. E. 1131, was disposed of by us upon the authority of O'Brien v. Fitzgerald. That case was very similar to the present one, with respect to the acts complained of on the part of the trustees of the savings bank, and presented a continuous system of mismanagement. The general term had there held that the action would lie in equity in order to prevent a multiplicity of actions. In the case of Higgins v. Tefft, 4 App. Div. 62, 38 N. Y. Supp. 716, the opinion of this court in O'Brien v. Fitzgerald was followed, and similar conclusions reached, as were affirmed by us upon the second appeal in that case.

In such actions as these the defendants, as directors, are not proceeded against, strictly, as trustees, but as agents acting for a principal, and for any damage caused by their neglect and violation of duty the remedy at law is adequate. The difficulties of proving the wrongful and neglectful acts of directors, the extent to which each has participated in the acts of mismanagement alleged, and the proportion or degree of their liability to respond in damages, are no greater in

a court of law than they would be in a court of equity. They are chargeable, not with the sums which have been lost, but only for the direct injury to the bank which resulted from the neglect of their duties. Directors of a corporation are not vested with the title to the property of the corporation, and therefore, as trustees, liable to account in equity for the disposition which they may have made of it. They are agents of the corporation, upon whom duties devolve of management and of care, for a failure in the performance of which they will be held liable at law for the damages which their corporation may be shown to have sustained.

Discovery is one of the elements of the right to resort to equity, but it would not properly consist in the ascertainment by the complainant of the several or proportionate liabilities of the defendants to the corporation for damages sustained by their neglect in the performance of the duties devolved upon them. It had reference, usually, to where an accounting was involved and a statement required of items of debit and credit, or of specific property with which the defendant was chargeable. It was the resort of a defendant, when sued at law, in aid of his defense, which, without a discovery, might fail of establishment. No accounting is necessary in such an action as this; for, if all the facts be true, there would be no sum of money as to which these defendants, or either of them would be held liable to account.

Without further discussion, the conclusion I have reached is that, although the pleader has endeavored, in the framing of his complaint, to give to it an equitable form, he has failed to do more than to show, and to enlarge upon, the difficulties of the plaintiff's situation and of making the proof to sustain a recovery. It only sets forth a cause of action for damages for the negligent and wrongful acts of these directors, where equitable relief is unnecessary, and where the defendants ought not to be deprived of their constitutional right of a trial by jury. If there is any hardship in these views, and if it is urged (which I do not admit) that the difficulty of holding delinquent directors responsible for their wrongful and negligent acts is added to and should require a different rule, the remedy should be sought for in legislation which would permit that form of action, which the law of the state does not now, in my judgment, permit. * * *

The judgments appealed from should be reversed, and the demurrer of the appellant is sustained, with costs. All concur, except MARTIN, J., not voting. Judgments reversed.[28]

[28] Contra: Emerson v. Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114 (1906); Booth v. Robinson, 55 Md. 419 (1880).

CHAPTER VI

LEGISLATIVE CONTROL

SECTION 1.—POWER OF THE LEGISLATURE TO REPEAL THE CORPORATE CHARTER

GREENWOOD v. UNION FREIGHT R. CO.

(Supreme Court of the United States, 1881. 105 U. S. 13, 26 L. Ed. 961.)

MILLER, J.[1] The appellant, Greenwood, a citizen of the State of New York, brought his bill of complaint against the Union Freight Railroad Company, a corporation established by the laws of Massachusetts; against the Marginal Freight Railroad Company, likewise a Massachusetts corporation; against the city of Boston, its mayor and aldermen by name; and against the directors of the Marginal Freight Railroad Company,—all citizens of Massachusetts.

The Union Freight Railroad Company demurred to the bill, and the demurrer was sustained and the bill dismissed. It is this decree which we are called on to review on appeal taken by complainant.

The case made by the bill is that the Marginal Freight Railroad Company, which we shall hereafter call the Marginal Company, was organized under an act of the legislature of Massachusetts of the date of April 26, 1867, to build and operate a railroad through various streets in the city of Boston, "with all the privileges and subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they are applicable." The right of way of this company for part of its route lay over the line of a railway previously granted to the Commercial Freight Railroad Company, and the Marginal Company, by virtue of a provision in its charter, purchased and paid the Commercial Company for the joint use of its track, so far as it ran through the same streets. Afterwards, on May 6, 1872, the legislature of Massachusetts incorporated, by an act of that date, the Union Freight Railroad Company, which, by virtue of its charter and the authority of the board of aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal Company, and to take possession of the track of that and any other street-railroad company, on payment

[1] A part of the opinion is omitted.

of compensation. This latter act also repealed the charter of the Marginal Company. * * *

The bill avers that the Union Freight Railroad Company has been organized, and is about to proceed in such a manner under this act that the Marginal Company will be utterly destroyed, and its several contracts, franchises, rights, easements, and properties will be impaired and destroyed, and the stock of complainant in said company will be destroyed and made valueless, and he will sustain irreparable damage and mischief. * * * The prayer of the bill is for an injunction against all the defendants, to prevent these acts so injurious to the rights of the Marginal Freight Railroad Company.

[The Court, after considering the right of the plaintiff to maintain this suit, proceeds:]

As none of the defendants are charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the act of May 6, 1872, the remaining question to be decided is, whether the features of that act to which complainant objects in his bill are beyond the power of the legislature of Massachusetts, or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two:

1. The repeal of the charter of the Marginal Company.

2. The authority vested in the Union Company to take its track for the use of the latter company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights, and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated; and we think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of the charter of the Marginal Company is void under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the State, unless it is made valid by that provision of the General Statutes of Massachusetts, called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in section 41 of chap. 68 of the General Statutes of Massachusetts, in the following language: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature."

It would be difficult to supply language more comprehensive or expressive than this.

Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the legislature," is significant, and is not found in many of the similar statutes in other States.

This statute having been the settled law of Massachusetts, and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we cannot doubt the authority of the legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the act of May 6, 1872, stood alone, its validity must be conceded. Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Erie & N. E. Railroad Co. v. Casey, 26 Pa. 287; Pennsylvania College Cases, 13 Wall. 190, 20 L. Ed. 550; 2 Kent, Com. 306.

It is argued, however, that the act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union Company the right to seize the track and other property of the Marginal Company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate that branch or feature of the statute may depend somewhat upon the effect of the repealing clause upon the rights of the Marginal Company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that act, whatever may have been the reasons which influenced the legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the legislature.

The forty-first section of chapter 68, as we have cited it, had a proviso, as it was originally enacted, "that no act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same." So that charters subject to the pleasure of the legislative will were only those of perpetual duration. This proviso was, however, either repealed by express enactment or intentionally left out in subsequent revisions of the statutes, for it is not found in that of

1860, known as the General Statutes of Massachusetts, nor in that of the present year, just published, called the Public Statutes of Massachusetts.

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and the creditors of such a corporation after the act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of Wales v. Stetson, 2 Mass. 143, 3 Am. Dec. 39, the Supreme Court of that State made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." In Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impair-

ing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the State legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of Wales v. Stetson, 2 Mass. 143, 3 Am. Dec. 39.

It would seem that the States were not slow to avail themselves of this suggestion, for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as to the effect of a repeal (McLaren v. Pennington, 1 Paige [N. Y.] 102), in which the legislature of New Jersey, when chartering a bank with a capital of $400,000 in 1824, declared by its seventeenth section that it should be lawful for the legislature at any time to alter, amend, and repeal the same. And Kent, 2 Com. 307, speaking of what is proper in such a clause, cites as an example a charter by the New York legislature, of the date of Feb. 25, 1822. How long the legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire, for in 1831 it enacted as a law of general application, that all charters of corporations thereafter granted should be subject to amendment, alteration, and repeal at the pleasure of the legislature, and such has been the law ever since.

This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. Pennsylvania College Cases, supra; Tomlinson v. Jessup, 15 Wall. 454, 21 L. Ed. 204; Railroad Company v. Maine, 96 U. S. 499, 24 L. Ed. 836; Sinking Fund Cases, 99 U. S. 700, 25 L. Ed. 496; Railroad Company v. Georgia, 98 U. S. 359, 25 L. Ed. 185; McLaren v. Pennington, supra; Erie & N. E. Railroad v. Casey, supra; Miners' Bank v. United States, 1 G. Greene (Iowa) 553; 2 Kent, Com. 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. It may well be supposed, if answer were required to the complainant's bill, that it was made to appear that the Marginal Company had shown its incapacity to fulfil the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given.

That in creating the later corporation, whose object was to fulfil a public use, it could authorize it to take such property of other corporations as might be necessary to that use, as well as that of individuals, can hardly admit of question. Sect. 4 of the act gives this power to the Union Company with reference to the tracks of all street railroads in the city, and provides that in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent

domain, on making due compensation. West River Bridge Co. v. Dix, 6 How. 507, 12 L. Ed. 535; Central Bridge Corporation v. City of Lowell, 4 Gray (Mass.) 474; Boston Water-Power Co. v. Boston & Worcester Railroad Corporation, 23 Pick. (Mass.) 360; Richmond, &c. Railroad Co. v. Louisa Railroad Co., 13 How. 71, 14 L. Ed. 55.

But it is the sixth section of the act which is most bitterly assailed as an invasion of appellant's rights. It declares that the Union Freight Company, within four months from the passage of the act, shall take the tracks, or any part thereof, of the Marginal Freight Company, subject to the laws relating to taking land by railroad companies and the compensation therefor. If, as the language seems to imply the new company is bound to take so much of the track of the old one as it shall need or elect to use, and pay for it within four months, it is a requirement favorable to this company in preference to others, and with especial reference to the fact that its power to use the track for railroad purposes has ceased. If it is merely a permission to take the track on payment of compensation, it is still a favor to the Marginal Company to require this to be done within four months.

A suggestion is made that the Marginal Company acquired by purchase, for $15,000, the right to the use of the track of the Commercial Freight Company, and that this property stands on different grounds from the remainder of its track.

We are unable to discover any difference in principle. If the new company takes this track, or takes the Marginal Company's right to use it, we suppose the latter will be entitled to compensation for its interest in it, as for other property taken for a public use.

In fact, in regard to the whole question discussed as to the mode of making compensation, and its sufficiency to indemnify the Marginal Company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel that the clause in the Marginal Company's charter, which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, withdraws it from the operation of the forty-first section of chapter 68 of the General Laws of the State. The latter clause declares all acts of incorporation subject to its provisions. This subjection is not impaired by the fact that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal Company is to be decided by the construction of the general statute, whose effect and history we have discussed.

These considerations require the affirmance of the decree of the Circuit Court sustaining the demurrer to appellant's bill. Decree affirmed.[2]

SECTION 2.—POWER OF THE LEGISLATURE TO ALTER OR AMEND THE CORPORATE CHARTER

COMMONWEALTH v. ESSEX CO.

(Supreme Judicial Court of Massachusetts, 1859. 13 Gray, 239.)

SHAW, C. J.[3] The Essex Company, the defendants in this case, were indicted in the court of common pleas for a violation of the St. of 1856, c. 289, requiring that company, before the 1st of February, 1857, to make, and forever thereafter maintain, in or around their dam in Lawrence, a suitable and sufficient fishway for the usual and unobstructed passage of fish, under a penalty of not less than $100 nor more than $500 a day for the time they should neglect to make and maintain such fishway after said 1st of February. This act was passed on the 6th of June, 1856.

The company, having failed to provide any new fishway after the passage of this act, were indicted for such neglect, and upon trial several grounds of defence were taken, which are set forth in the bill of exceptions. As the several questions substantially resolve themselves into one general consideration of the rights of this company, instead of considering the admissions and rejections of the evidence, and the particular rulings of the court thereon, in detail, it may be more convenient to state the real ground of controversy.

The Essex Company were created a corporation by St. 1845, c. 163, for the purpose of constructing a dam across the Merrimac River, and constructing one or more locks and canals in connection with said dam; for the purpose of creating a water-power to use, or sell, or lease to other persons or corporations to use, for manufacturing and mechanical purposes; and for constructing a main canal, for navigation or transports. By section 5, the said corporation was required to make and maintain, in the dam so built by them across said river, suitable and reasonable fishways, to be kept open at such seasons as are necessary and usual for the passage of fish. By section 7, they

[2] Accord: Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co., 8 Del. Ch. 468, 46 Atl. 12 (1900); Wilmington City Ry. Co. v. People's Ry. Co. (Del. Ch.) 47 Atl. 245 (1900); Wagner Institute v. Philadelphia, 132 Pa. 612, 19 Atl. 297, 19 Am. St. Rep. 613 (1890); Citizens' Savings Bank v. Owensboro, 173 U. S. 636, 19 Sup. Ct. 530, 571, 43 L. Ed. 840 (1899).

Compare People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684 (1888); Erie & North East Ry. Co. v. Casey, 26 Pa. 287 (1856); Yeaton v. Bank of Old Dominion, 62 Va. 593 (1872).

[3] Facts sufficiently stated in the opinion, which is in part omitted.

were required to build such fishways in the mode prescribed by the county commissioners, after due notice and a public hearing of all parties interested, with power to the commissioners to examine and determine whether the fishways have been built according to such mode prescribed, and, if so, to accept the same.

By an additional act passed in May, 1848, the company were authorized to increase their capital stock, but upon an express condition. St. 1848, c. 295. This condition was, "that said company shall be liable for all damages which shall be occasioned to the owners of fish rights existing above the said company's dam, by the stopping or impeding the passage of fish up and down the Merrimac River by the said dam." An adequate and constitutional mode of assessing these damages was provided by the act, which of course would not be resorted to when such damages should be agreed upon by the owners of such fish rights and the company, and paid. This act contained a further proviso, that nothing contained in the 7th section of the act of incorporation—the section requiring the company to make and maintain fishways—should be deemed to be a bar to such claim for damages. A second section of this act of 1848 provided that the act should take effect whenever the stockholders, at a legal meeting, should accept the provisions of the preceding section and file an authenticated copy of their vote of acceptance in the office of the secretary of the Commonwealth. It is conceded that such a vote, accepting this act, was duly passed, and an authenticated copy of it filed with the secretary of the Commonwealth soon after the passage of the act. The construction of this statute and the acts done under it by the defendant company will be considered hereafter.

By the above statutes the obligation of the company in preserving the fishway on the Merrimac River, as a consideration and condition of the franchise granted them, was fixed and determined, until the passage of the act eight years after, St. 1856, c. 289, by which the company were required to make and forever thereafter maintain in or around their dam in Lawrence, a suitable and sufficient fishway for the usual and unobstructed passage of fish, during the months of April, May, June, September, and October, in every year.

This is the statute upon which this indictment is found, and the question is, whether the company are liable for the heavy penalties therein declared, for neglect of the duty thus prescribed.

[The court, after determining that the Legislature has power to regulate the public right of fisheries, proceeds:]

To preclude all question as to the right of the Legislature thus to impose a new obligation upon the company; it was provided that the act (St. 1848, c. 295) should not take effect until it should be in terms accepted at a meeting of stockholders called for that purpose, and authentic evidence thereof filed in the office of the secretary of the Commonwealth for the information and benefit of all persons con-

cerned, as well those individual riparian owners who might claim their rights under it, as those persons who might afterwards acquire or hold shares in the stock of said company. This appears to us to be the direct meaning and construction of this enactment. It was not a new provision, requiring the better performance of a pre-existing duty; it was substituting a new species of indemnity to parties, where none in any form existed before, either by an action of tort at common law, or by a claim for damages under any statute.

Under these circumstances, it appears to us, especially after it has been acceded to by the company, and after they have paid a large sum of money in pursuance of it, that this enactment has in it all the elements of a contract executed by one party and binding on the other.

5. The remaining question is whether the act of 1856 is justified by the provision in Rev. Sts. c. 44, § 23, that acts of incorporation afterwards passed should be subject to amendment, alteration, or repeal? That provision is, that every act of incorporation shall at all times be subject to amendment, alteration, or repeal, at the pleasure of the Legislature; provided, that no such act shall be repealed, unless for violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same.

The power of repeal is limited and qualified, and was so considered in the case of Crease v. Babcock, 23 Pick. 334, 34 Am. Dec. 61.

Does this come within the power of the Legislature to amend or alter? It seems to us that this power must have some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business; and they purchased such lot from a third party; could the Legislature prohibit the company from holding it? If so, in whom should it vest; or could the Legislature direct it to revest in the grantor, or escheat to the public; or how otherwise?

Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid; can the Legislature afterwards alter the act of incorporation so as to give to such meadowowners future annual damages? Perhaps from these extreme cases—for extreme cases are allowable to test a legal principle—the rule to be extracted in this; that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.

It appears to us, in the present case, that after the government, acting in behalf of the public, and also of all those riparian owners whose fish-rights would be damnified by the defendant's dam, with the fishway as it was, entered into a solemn and formal contract with

the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fishway, if such were practicable, by indemnifying all parties damnified in their several fisheries, and the defendant company had executed their part of the contract by the payment of a large sum of money, it was not competent for the Legislature, without any change of circumstances, under their authority to amend and alter the charter of the company, to pass a law requiring them to do the acts from which by the terms of such contract, they had been exempted, and therefore that the said act was null and void, and this indictment founded upon it cannot be maintained. Exceptions sustained.

THE RAILROAD TAX CASES.

COUNTY OF SAN MATEO v. SOUTHERN PAC. R. CO.

(Circuit Court of the United States, 1882. 13 Fed. 722.)

This was an action commenced by the county of San Mateo, California, under the provisions of the statutes of the state for the recovery of state and county taxes claimed to be due from the defendant to the plaintiff for the fiscal year, 1881–82.

In addition to a general denial the defendant sets up, among others, as special matters of defense (1) that an unlawful discrimination was made in assessing the tax, since no deduction was allowed for mortgage indebtedness which is allowed in the assessment of an individual's property; (2) that no opportunity was given for a hearing respecting the assessment; that in consequence the defendant was denied the equal protection of the laws guaranteed by the fourteenth amendment of the federal constitution.

The assessment was made pursuant to the provisions of the Constitution of California, adopted in 1879. The suit was commenced in the state court and removed to this court.[4]

FIELD, J.[5] [The court, after discussing the taxing powers of the states, proceeds:]

It remains to consider the last position of counsel, that the provisions of article 13 of the constitution of the state, as to the taxation of railroad property, are to be treated as conditions upon the continued existence of railroad corporations. On the hearing, this position seemed to us to possess some force, but on careful consideration its supposed force is dissipated. The argument is that on the original creation of the corporation the state might have imposed any conditions whatever as to the manner and the amount in which its property should be taxed; that under the reserved power of amend-

[4] Statement of facts substituted.

[5] A part of the opinion is omitted.

ment of the law creating the corporation, the state could at any time afterwards impose such a condition; that the new constitution, in continuing the defendant and other railroad corporations in existence, and at the same time authorizing the taxation of their property upon a valuation different from that at which the property of individuals is assessed, imposed that condition upon them, and that the subsequent exercise of its franchises by the defendant implies an assent to such condition.

There are two answers to this argument. In the first place, article 13 is not intended to make any change in the powers or rights of corporations under the laws of the state. It treats entirely of revenue and taxation, and of the rules which shall govern the assessment of the property of individuals, and of railroad and other quasi public corporations. It is in another article that provisions are made for the control of railroad corporations; and the duties and responsibilities of corporations generally, and the power of the state over them, are declared.

In the second place, the state, in the creation of corporations, or in amending their charters, or rather in passing or amending general laws under which corporations may be formed and altered, possesses no power to withdraw them when created, or by amendment, from the guaranties of the federal constitution. It cannot impose the condition that they shall not resort to the courts of law for the redress of injuries or the protection of its property; that they shall make no complaint if their goods are plundered and their premises invaded; that they shall ask no indemnity if their lands be seized for public use, or be taken without due process of law, or that they shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the state may exercise unlimited and irresponsible power. Whatever the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. It may confer, by its general laws, upon corporations certain capacities of doing business, and of having perpetual succession in their members. It may make its grant in these respects revocable at pleasure; it may make the grant subject to modifications and impose conditions upon its use, and reserve the right to change these at will. But whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law, nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances.

The state grants to railroad corporations formed under its laws a franchise, and over it retains control, and may withdraw or modify it. By the reservation clause it retains power only over that which it grants; it does not grant the rails on the road; it does not grant

the depots along-side of it; it does not grant the cars on the track, nor the engines which move them, and over them it can exercise no power except such as may be exercised through its control over the franchise, and such as may be exercised with reference to all property used by carriers for the public. The reservation of power over the franchise,—that is, over that which is granted,—makes its grant a conditional or revocable contract, whose obligation is not impaired by its revocation or change. The supreme court established, in the Dartmouth College Case, that the charter of a private corporation is a contract between the corporators and the state, and that it was, therefore, within the prohibition of the federal constitution against the impairment of contracts. To avoid this result the states have generally inserted clauses in their constitutions reserving a right to repeal, alter, or amend charters granted by their legislatures, or to repeal, alter, or amend the general laws under which corporations are allowed to be formed. The reservation relates only to the contract of incorporation, which, without such reservation, would be irrepealable. It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the supreme court held that charters are not contracts, and that laws repealing or altering them did not impair the obligation of contracts. The property of the corporation, acquired in the exercise of its faculties, is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business.

The case of Detroit v. Detroit & Howell Plank-Road Co., in the supreme court of Michigan, is in point on both of the propositions stated. An act of the legislature of the state, amending the charter of the company, required it to remove without the limits of the city of Detroit a toll-gate on its road, then within the limits. The effect of the act was to take from the company about two and a half miles of its road, upon which it collected tolls. The act under which the company was incorporated reserved a power in the legislature to repeal and amend it at any time, and the question was whether, under this reservation, the legislature could require the removal of the toll-gate out of the city; and it was held that it could not. Ordinarily a law, requiring the removal of a toll-gate from one place to another on a road would be a mere police regulation, but here it was something more; it deprived the company of compensation for the use of its road within the city limits; that is, for a large part of the travel over it. The court, speaking through Mr. Justice Cooley, observed that there were cases in which amendments to charters having some resemblance to this had been sustained, and cited several which involved a mere police regulation, such as requiring a railroad company to build a station-house and stop its trains at a certain locality; to permit and provide for the crossing of its track;

and to unite with others in a common passenger station for trains entering a city. "But [the court added] there is no well-considered case in which it has been held that a legislature, under its power to amend a charter, might take from a corporation any of its substantial property or property rights. In some cases the power has been denied, where the interest involved seemed insignificant. The case of Albany, etc., R. Co. v. Brownell, 24 N. Y. 345, is an illustration. It was there decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden, except in connection with the provision for compensation. The decision was in accord with that in Com. v. Essex Co., 13 Gray (Mass.) 239, 253, in which, while the power to alter, amend, or repeal the corporate franchises was sustained, it was at the same time declared that 'no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' The same doctrine is clearly asserted in Railroad Co. v. Maine, 96 U. S. 499, 24 L. Ed. 836, and is assumed to be unquestionable in the several opinions delivered in the Sinking-fund Cases, 99 U. S. 700, 25 L. Ed. 496. But for the provision of the constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the state where any sovereignty would be, if unrestrained by express constitutional limitations and with the powers which it would then possess. It might, therefore, do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired,—whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the state; it is enough that it has become private property, and it is then protected by the 'law of the land.'" 43 Mich. 140–147, 5 N. W. 275.

We have already extended this opinion to a great length, and we do not think it necessary or important to notice other positions urged by counsel with great learning and ability against the validity of the taxes for which the present action is brought. We are satisfied that the assessment upon which they were levied is invalid and void, and judgment must be accordingly entered on the demurrer for the de-

fendant, and, by stipulation of parties, the judgment must be made final.

[Other similar pending actions enjoined pending an appeal from this decision to the United States Supreme Court.][6]

COMMONWEALTH v. EASTERN R. CO.

(Supreme Judicial Court of Massachusetts, 1869. 103 Mass. 254, 4 Am. Rep. 555.)

CHAPMAN, C. J. By the St. of 1868, c. 89, the defendants are required to establish a flag station on their railroad at Knight's Crossing in Newbury, and erect there a station-house at which at least two trains each way and each day shall stop. The statute has not been complied with, and the defendants contend that it is unconstitutional. The defendants were chartered April 14, 1836, subject to the provision in the Revised Statutes that every act of incorporation passed since March 11, 1831, shall at all times be subject to amendment, alteration, or repeal at the pleasure of the Legislature (Rev. Sts. c. 44, § 23; re-enacted by Gen. Sts. c. 68, § 41), and to the provisions of the 39th chapter of the Revised Statutes.

The defendants say that the Act of 1868 violates the contract made with them by the Commonwealth; and requires them to expend their property for an assumed public use without compensation, contrary to the Constitutions of the United States and of this State.

That such a charter is a contract is not denied. It was so held in Dartmouth College v. Woodward, 4 Wheat. 518; and charters are habitually spoken of as contracts. In Blakemore v. Glamorganshire Canal Navigation, 1 Myl. & K. 154, Lord Eldon said he regarded them all in the light of contracts made by the Legislature on behalf of every person interested in anything to be done under them. In respect to charters for railroads, both the Legislature and the corporation act as trustees of the public interest to some extent; for the corporation is intrusted with the exercise of the right of eminent domain, which is in its nature a public right, and is not to be sacrificed to uses that are exclusively private. The private interests of the stockholders are likely to have a controlling influence with the officers of the company, and it is important that the Legislature should possess the power to prevent abuses to which this influence may lead. To some extent they would possess such a power without any clause in the charter reserving it. But to define their rights more clearly, the clause has been introduced reserving to them the power to alter, amend, and repeal. This clause constitutes a part of the express contract between the Legislature and the corporation. The question arising in the present case is, whether the Act of 1868 above

[6] The concurring opinion of Sawyer, Circuit Judge, is omitted.

referred to is within the fair interpretation of this clause. In several cases this clause has been the subject of discussion. In Roxbury v. Boston & Providence Railroad Co., 6 Cush. 424, 432, it was said by the court that the clause authorized the Legislature to make reasonable alterations and amendments, and it was held that the St. of 1842, c. 22, which authorized county commissioners, upon the application of the selectmen, etc., to alter or lower roads so as to prevent crossings at the same grade with a railroad, and to require the corporation to pay the expense with costs, was a valid act. It is true that it was a general act; but it required corporations to expend money for the benefit of the public and without any apparent equivalent to themselves, except to diminish the danger of collisions with travellers on the highway. In Fitchburg Railroad Co. v. Grand Junction Railroad & Depot Co., 4 Allen, 198, 205, the clause was applied to special statutes of 1856, c. 296, and 1857, c. 128, which required the Fitchburg, the Grand Junction, and the Boston and Lowell Railroad corporations to make expensive changes at their crossings, and to erect a bridge of specified dimensions and materials, and construct a connecting track, and which directed how the work should be superintended, and how the expense should be apportioned. The court held that under this clause the changes were rightly ordered, and that the Legislature might prescribe by whom, in what manner, and under whose supervision the work should be accomplished, and in what proportions according to their respective interests it should be paid for by the parties affected by it. As these are special acts directing expensive changes at a particular locality, the present case seems to be covered by that.

But independently of the authority of those cases, it seems to us that the clause was intended to provide for such a case as the present. If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations or do any way business for that reason, though the road passed for a long distance through a populous part of the State, this would be a case manifestly requiring and authorizing legislative interference under the clause in question. And on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the Legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the Legislature to determine; and their determination on this point must be conclusive.

The objection that it takes the property of the company and appropriates it to the benefit of others is not valid. The depot which

they are required to build is to be their own, like all the other depots, and their compensation for all their outlays is in their freights and fares. If the act required them to build a structure for the private benefit of others exclusively, and having no connection with the business of their road, the case might be within the principle stated in Commonwealth v. Essex Co., 13 Gray, 239, 253, as it would take away their property or rights which had become vested under a legitimate exercise of the power granted them. It was there held that an act requiring a water-power company to erect a fish-way in their dam was void. But the act upon which this action is brought is not subject to such an objection. It is a modification of the charter, within the fair interpretation of the power reserved to the Legislature in the charter, and merely requires them to provide what the Legislature regards as a reasonable accommodation to the public in a particular locality where they are using property which they have taken for that purpose.

Judgment for the Commonwealth.

KENOSHA, R. & R. I. R. CO. v. MARSH.

(Supreme Court of Wisconsin, 1863. 17 Wis. 13.)

PAINE, J. This action was brought upon a subscription to the capital stock of a railroad company chartered to build a road from the city of Kenosha to Beloit. Ch. 60, Pr. Laws of 1853. Afterwards, by Ch. 22, Pr. Laws of 1857, the Legislature changed the enterprise from that of building a road to Beloit, to one of building a road to the state line between this state and Illinois, at or near Genoa, in Walworth County. This change was obtained by the company, which acted under it, and, under still another law, consolidated with an Illinois company which was authorized to build a road from Rockford in that State to the same point on the state line. This action was brought by the consolidated company.

After the evidence of both parties had been introduced, the defendant moved for a nonsuit, for the reason, among others, that this was such a radical change in the enterprise as released him from his subscription. The motion was granted upon another ground, but we think it was properly granted upon this.

Considered independently of the effect of the power reserved in our constitution to the Legislature, to amend or repeal the charters of all incorporations, all authorities concur in stating the general rule to be, that a radical, fundamental change in the character of the enterprise releases the stock subscriber who does not assent. In applying this rule many cases are found where the particular change made was held not to be of this character. But we think the plain implication from the reasoning in all of them is, that a change like

the one here in question would be so held. Thus in Banet v. R. R. Co., 13 Ill. 504, the change made only straightened the original route, leaving it between the same termini. The court held that this was not a radical change, but that it left the enterprise substantially unchanged. But they say expressly that if the change had been to authorize a road from Alton to Vandalia or Shelbyville, it would have been a different enterprise. But it will be seen by a reference to the map that a change to a road from Alton to Shelbyville would have been very similar to the one made here. The road as changed here runs in a line entirely southwest of the original route, and to a point only about half as far as Beloit. Within the reasoning of all the cases we think this is a change from one enterprise to another, and not one which leaves the original enterprise substantially remaining.

The supreme court of Indiana has recently held that the mere consolidation with another company under an act of the Legislature releases non-assenting subscribers. McCray v. R. R. Co., 9 Ind. 358; Booe v. R. R. Co., 10 Ind. 93. I should not wish to adopt that conclusion without further examination. For although it may be within the principle of R. R. Company v. Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354, and other cases of a similar character, still there seems to me to be a fair distinction between such changes as only add something to the original enterprise,—which becomes tributary to it, and makes its operation more perfect and successful, and changes which abandon the original undertaking for a new one. There is certainly some ground for saying that changes of the former character may be deemed to be fairly within the scope of the original object, as it may reasonably be assumed that every association which undertakes the accomplishment of a particular enterprise, intends to make such changes as experience may show to be necessary for its most successful prosecution. And if this may be assumed, then, although such changes were of course not originally provided for, yet they may fairly be regarded as so far incidental to the original purpose as to be within the scope of the authority which each member has conferred upon the corporation, to bind him by its action whenever the necessary legislative assent is obtained. And if this can be regarded as a correct rule, I should not be prepared to say that a consolidation with another company whose road ran from either terminus in the same general direction, or the connection of a line of steamboats with the road, when one of the termini was on navigable water, if authorized by the Legislature and assented to by the corporation as a body, ought to release a stockholder who did not assent.[1] These things are totally different in their nature from a change which abandons the original enterprise entirely. These cases go, therefore, much further than it is necessary to go here. The following cases also sustain the conclu-

[1] See Hale v. Cheshire Railroad, 161 Mass. 443, 37 N. E. 307 (1894); Lauman v. Lebanon Valley Ry. Co., 30 Pa. 42, 72 Am. Dec. 685 (1858).

sion that such a change as was made here releases subscribers not assenting. Plank Road Company v. Arndt, 31 Pa. 317; Hester v. Memphis & Charleston R. Co., 32 Miss. 378. The following cases, as stated in the Digest, sustain the same rule, though the volumes have not yet arrived in our library: Champion v. Memphis R. Co., 35 Miss. 692; vol. 20, U. S. An. Dig. p. 219, § 222; Witter v. Miss., etc., R. Co., 20 Ark. 463; vol. 20, U. S. An. Dig. p. 219, § 235. See, also, Fry's Ex'rs v. R. R. Co., 2 Metc. (Ky.) 314.

The question then remains, whether the power reserved in the constitution to amend, alter, or repeal charters should prevent that effect. Some of the cases seem to place great stress upon the existence of this power, and to intimate that under it the non-assenting stock subscriber may be bound by a change, the effect of which would otherwise be to release him. I am wholly unable to see that it should have any such effect. The occasion of reserving such a power either in the constitution or in charters themselves is well understood. It grew out of the decisions of the supreme court of the United States that charters were contracts within the meaning of the constitutional provision that the States should pass no laws impairing the obligation of contracts. This was supposed to deprive the States of that power of control over corporations which was deemed essential to the safety and protection of the public. Hence the practice, which has extensively prevailed since those decisions, of reserving the power of amending or repealing charters. But this power was never reserved upon any idea that the Legislature could alter a contract between a corporation and its stock subscribers, nor for the purpose of enabling it to make such alteration. It was solely to avoid the effect of the decision that the charter itself was a contract between the State and the corporation, so as to enable the State to impose such salutary restraint upon these bodies as experience might prove to be necessary. But I suppose it would hardly be claimed that the State, even where this power of amendment is reserved, could, by amending the charter of a railroad company so as to provide for a new and entirely different road, impose any obligation on the corporation to build it. It might possibly repeal the old charter, but whether the company would undertake the enterprise provided for in the amendment, would still depend entirely upon its own consent; as it is well settled that a grant of corporate franchises cannot be imposed upon any persons against their consent, any more than any other grant.

Undoubtedly, the Legislature might, under this power, impose new duties and new restraints upon corporations in the prosecution of the enterprises already undertaken. And provisions of this nature would be binding whether assented to or not. But when it comes to a question of embarking in a new enterprise, the Legislature cannot impose this as a duty upon any corporation. All it can do is to grant it the power, and then it is for the corporation to accept it or not, as it pleases. So that, in all cases where charters are changed, the

right to bind stock subscribers who do not assent seems to me to derive no additional support from the fact that the power of amending the charter had been reserved, but to depend essentially upon the question whether the change is of such a character that it may be deemed so far in furtherance of the original undertaking, and incidental to it, as to be fairly within the power of the corporation to bind its individual members by its corporate assent, or whether it is such a departure from the original purpose that no member should be deemed to have authorized the corporation to assent to it for him. If I am correct in supposing that an amendment authorizing an entirely different road would not be binding on the corporation without its own assent, it must follow that the question whether any particular subscriber is bound must depend upon the question whether he has himself assented, or whether the rest could bind him by their assent, and not on the question whether the Legislature had power to pass the amendment.

The result of my views upon this point is, that an amendment of this kind, merely authorizing the substitution of a new enterprise for the old, has precisely the same effect that it would have had if there had been no power reserved to amend the charter. The Legislature does not profess to make it obligatory. They grant it as a power to be accepted if the company chooses to accept it; otherwise not. This is just what they might have done if the power of amendment had not been reserved. And it seems to me that the question whether an individual subscriber was bound or not by the corporate assent, should be determined by the same principles in either case. The power of amendment was never reserved with reference to any question between the corporation and its stock subscribers, but solely with reference to questions between the corporation and the State, when the latter desired to make compulsory amendments against the wish of the former.

The effect of this reserved power is discussed in the Matter of Oliver Lee & Co.'s Bank, 21 N. Y. 20, 21, by Judge Denio. The amendment there made did not attempt to change the corporate enterprise, but belonged to the class I have referred to, of amendments designed for the better protection of the public. It was a case where new liabilities were imposed on the stockholders, arising from the continued exercise of the corporate powers originally conferred. There being, therefore, no question in the case of a radical change of the original enterprise, I cannot think the judge intended that his remarks should be applicable to such a case. I cannot think that he intended to say that any person who subscribes for the stock of a corporation chartered for a special enterprise, where the power to alter or amend the charter is reserved by the Legislature, has thereby agreed that the Legislature, and the majority of his associates may, without his consent, transfer his investment to a totally different project. Indeed, that this could not be done is fairly implied from a subsequent

opinion of Judge Denio in Plank Road Company v. Griffin, 24 N. Y. 156. There the company was originally chartered to build a plank road. Afterwards a law was passed extending the time in which they were allowed to finish it by laying down plank and allowing them, in the mean time, to erect toll-gates and exercise the rights of turnpike companies. The judge says: "It is certainly possible that this act was obtained simply as a cover for abandoning the plan of a plank road, and to enable the directors to establish a turnpike. This, however, is not the presumption of the law. On the face of the enactment it simply conferred on the corporation an indulgence which it would not otherwise possess, of postponing the completion of the road for a considerable time, and of so managing it that it should be a source of profit in the mean time. I think this was within the scope of the reservation contained in the general act which declares that the Legislature may at any time alter, amend, or repeal it, and may amend and repeal any corporation which may be formed under it."

This plainly implies that if the act had abandoned the original project, the subscriber would not have been bound. For the judge had no occasion to make the argument he did to show that the change was within the scope of the power of amendment, if that power was unlimited.

Pierce, in his work on Railroads, p. 98, gives it as the result of the authorities, that even when the power of amending is reserved, it is not unlimited, but "that such a radical change in the company as diverts it from its original purpose" is not binding on a dissenting shareholder. But if the power is not unlimited, where is the limit? By what principles is it to be established? I know of none except those I have already contended for, which base the right upon the implied authority conferred by each one who becomes a member of a corporation, on the majority, to bind him by such changes as may fairly be regarded as incidental to the original project.

The judgment must be affirmed.[8]

LORD v. EQUITABLE LIFE ASSUR. SOCIETY OF UNITED STATES.

(Court of Appeals of New York, 1909. 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. [N. S.] 420.)

Action by Lord, a stockholder in the Equitable Life Assurance Society, to restrain the society from so amending its charter as to give

[8] Accord: W. W. Woodfork v. Union Bank, 3 Cold. (Tenn.) 488 (1866); Avondale Land Co. v. Shook, 170 Ala. 379, 54 South. 268 (1911); Zabriskie v. Hackensack & N. Y. R. Co. (semble) 18 N. J. Eq. 178, 90 Am. Dec. 617 (1867); Mills v. Central Ry. Co. (semble) 41 N. J. Eq. 1, 2 Atl. 453 (1886).

Contra: Schenectady & Saratoga Plank Road Co. v. Thatcher, 11 N. Y. 102 (1854); Troy & Rutland Ry. Co. v. Kerr, 17 Barb. (N. Y.) 581 (1854); Durfee v. Old Colony Ry. Co. (semble) 5 Allen (Mass.) 230 (1862).

the policy holders the right to vote for a majority of the directors and to limit stockholders to the right to vote for a minority only.

The defendant company was organized in 1859, pursuant to the provisions of chapter 463 of the Laws of 1853. The charter among other provisions contained the following:

"The holders of the said capital stock may receive a semiannual dividend on the stock so held by them, not to exceed three and one half per cent. of the same; such dividends to be paid at the times, and in the manner designated by the directors of said company. The earnings and receipts of said company, over and above the dividends, losses and expenses shall be accumulated. The corporate powers of said company shall be vested in a board of directors. * * * In the election of directors, every stockholder in the company shall be entitled to one vote for every share of stock held by him, and such vote may be given in person, or by proxy. At any time hereafter, the board of directors, after giving notice at the two previous stated meetings, by a vote of three-fourths of all the directors, may provide that each life policy holder, who shall be insured in not less than five thousand dollars, shall be entitled to one vote at the annual election of directors, but such vote shall be given personally, and not by proxy."

In 1906 the Legislature passed an act providing in substance that any stock life insurance company may by a vote of a majority of the directors, when authorized by stockholders holding a majority of the capital stock, confer upon its policy holders the right to vote for all or any less number of directors. The primary question is whether the Legislature had power to pass the act of 1906.[9]

VANN, J.[10] [The Court, after discussing the legislative power to amend or repeal the charter, proceeds:]

Our conclusion upon the primary question involved is that both by the Constitution and the Revised Statutes the Legislature has the reserved power to so amend the law under which a charter has been taken out as to carry with it a corresponding amendment of the charter itself, either directly, or by authorizing the corporation to make the change. Pratt Institute v. City of New York, 183 N. Y. 151, 162, 75 N. E. 1119; People ex rel. Cooper Union v. Gass, 190 N. Y. 323, 83 N. E. 64, 123 Am. St. Rep. 549, 13 Ann. Cas. 678; People ex rel. Roosevelt Hospital v. Raymond, 194 N. Y. 189, 87 N. E. 90. Any other conclusion, in view of the immense number of corporations now organized under existing laws, would be a disaster to society and a menace to the state. Those charters would stand, like the laws of the Medes and Persians, unchangeable by all the power of the state, for, although they could be repealed, they could not be amended. Other authorities bearing upon the subject will be noticed hereafter.

The right to amend a charter, however, does not include the right to

[9] Statement of facts substituted.

[10] A part of the opinion is omitted.

take away money invested in reliance thereon, or property acquired thereunder. The power of amendment reserved by the Constitution or statutes of a state does not permit interference with property or property rights, because they are protected by the Constitution of the United States. When the Legislature has created a corporation and has given it power to acquire property, it cannot take away the property so acquired without providing for compensation. Mayor, etc., of N. Y. v. Twenty-Third St. R. Co., 113 N. Y. 311, 317, 21 N. E. 60. No reservation, for instance, could authorize a law giving to policy holders the capital stock belonging to the stockholders. As the property of stockholders cannot be given away either in whole or in part, it follows that the gift of any right so connected with their property as to be essential to its preservation and existence would be a violation of primary rights. Hence the second question presented is whether the right of a stockholder to vote is a vested right of property. * * *

The stockholders of a corporation, as such, have no direct power of management, and even by united action they can neither bind nor loose the company by making contracts or controlling investments. The capital stock owned by them is property. It represents an investment upon which they are entitled to dividends, provided they are earned, and whether they can be earned or not depends on the management. Indeed, the safety of the entire investment depends on the power to manage the corporate business, because, even in the case of the defendant with its immense surplus, careless and improvident management might impair the value of the stock or utterly destroy it. The right to vote for directors therefore is the right to protect property from loss and make it effective in earning dividends. In other words, it is the right which gives the property value and is part of the property itself, for it cannot be separated therefrom. Unless the stockholder can protect his investment in this way he cannot protect it at all, and his property might be wasted by feeble administration, and he could not prevent it. He might see the value of all he possessed fading away, yet he would have no power, direct or indirect, to save himself or the company from financial downfall. With the right to vote, as we may assume, his property is safe and valuable. Without that right, as we may further assume, his property is not safe and may become of no value. To absolutely deprive him of the right to vote therefore is to deprive him of an essential attribute of his property. To so undermine that right as to essentially affect its power of protection would, under ordinary circumstances, undermine the right to property involved in the ownership of stock, and we have so held. Stokes v. Continental Trust Company, 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738.

These are general rules, and under "ordinary circumstances" therefore the Legislature could not by direct action essentially impair the right of the plaintiff to vote as a stockholder, nor could it do so indirectly, by authorizing the directors, with the consent of only a majority

of the stockholders, to so amend the charter as to have that effect. The circumstances under which the attempt to mutualize the charter of the defendant was made, however, were not "ordinary," because that right was conferred upon the directors by the original charter itself, although the right was to be exercised in a different manner from that provided by the act of 1906. The old charter, although it organized a stock company, not only limited dividends to 7 per cent. a year, but required that all earnings and receipts in excess of dividends, losses, and expenses should be accumulated. Even if the surplus multiplied the capital, as it has in fact, 800 times, still but 7 per cent. on the sum of $100,000 could be paid in dividends to the stockholders.

But the charter did not stop there, for it further provided that the business of the company should be conducted on the mutual plan, which means that the policy holders were not simply creditors of the corporation, but were to share in the surplus which they created upon some basis. That basis was defined, for at fixed periods each policy holder was to be credited "with an equitable share" of the net surplus. This did not mean that all of it was to be divided among the policy holders, but that a division should be made upon some equitable basis consistent with the safety and prosperity of the company, when changes in the value of securities and other business hazards were taken into account. They became the equitable owners of an equitable share in the surplus to the extent provided by the charter, which makes no distinction between the surplus arising from insurance proper and that arising from the sale of annuities, unless it may be implied from the division directed to be made upon an equitable basis. Finally, and more important than all else, mutualization was provided for by authorizing the directors, by a vote of three-fourths of their number, to provide that each life policy holder holding insurance to the amount of not less than $5,000 should be entitled to one vote at the annual election.

Thus the charter carried in its soil the seeds of mutualization, planted by the founders of the company in readiness to sprout at the will of three-fourths of the directors, regardless of the wishes of the stockholders, as such. They took their stock subject to the right thus reserved to the directors, and were bound to abide by the result, for the reservation in a certificate of incorporation of the right to amend the charter in any manner permitted by law is as binding on the stockholders as any other part of the certificate.

What did the act of 1906 authorize that was not permitted by the original charter itself? There was no difference in substance, for mutualization, which might deprive the stockholders of control, was permitted by both; but there was some difference in details. The charter provided a way, but did not make it exclusive. The statute authorizes every domestic insurance corporation to "amend its charter or certificate of incorporation by inserting therein any statement or matter which might have been originally inserted therein; and * * *

by inserting therein any powers which, at the time of such amendment, may have been conferred by law upon domestic insurance corporations engaged in a business of the same general character, or which might be included in the certificate of incorporation of a domestic insurance company organized under any general law of this state for a business of the same general character." It further authorizes a majority of the directors, with the consent of stockholders representing at least a majority of the capital stock, to confer upon the policy holders, "or upon such policy holders as may have a prescribed amount of insurance upon their lives the right to vote for all or any less number of the directors" in any manner not inconsistent with the other provisions of the act. Insurance Law, § 52, as amended (Laws 1906, p. 771, c. 326, § 13). The old charter authorized the directors, by a vote of three-fourths of their number, to enfranchise policy holders holding not less than $5,000 of insurance, but the right was to be exercised in person and not by proxy. The statute contains a provision for notice to the stockholders, but none, unless by implication, for notice to the directors; while the charter requires notice to be given at two stated meetings of the directors previous to the meeting at which the action to mutualize is taken.

These variations are differences of detail, not of substance, and they were within the control of the Legislature under the reserved power which we have held it possesses. The object of the reservation in the charter was to permit the enfranchisement of policy holders, and that is all the Legislature has authorized. Mutualization is the substance, the method is detail, and, when the substance is under the control of the Legislature, control of the details follows as a necessary incident. All things permitted by the old charter the Legislature had the power to authorize, with such modification as to details as it regarded as proper in the interest of public policy, without trespassing upon vested rights. Even if the result would place the policy holders in control of the affairs of the company, the stockholders took their stock subject to that contingency, and cannot now lawfully complain of what they or their predecessors consented to when they invested in the capital stock.

We think the act of 1906, so far as it is now before us, is a valid exercise of legislative power, forbidden by neither state nor federal Constitution. The authorities relied upon are not directly in point, for the situation is without precedent; but it is clear that the tendency of authority, both state and national, is to hold that the Legislature has wide latitude of amendment when the general power is reserved either by Constitution or statute.[11] * * *

[11] The dissenting opinion of Edward T. Bartlett, J., is omitted.

See Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N. Y. Supp. 357 (1905); Berea College v. Commonwealth of Kentucky, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81 (1908); Venner v. Chicago City Ry. Co., 246 Ill. 170, 92 N. E. 643, 138 Am. St. Rep. 229, 20 Ann. Cas. 607 (1910).

SCHOOL DISTRICT NO. 56 v. ST. JOSEPH FIRE & MARINE INS. CO.

(Supreme Court of the United States, 1880. 103 U. S. 707, 26 L. Ed. 601.)

MILLER, J. The defendant in error recovered a judgment in the Circuit Court of the United States for the District of Nebraska against the plaintiff in error for the sum of $2,554.70. The judges of the Circuit Court certified a difference of opinion on three questions of law arising in the case, only one of which is necessary to be considered here, namely: "Whether the said act of the legislature of Nebraska, approved Feb. 2, 1875, recited in the bonds (the coupons of which are in suit), is in conflict with section 1 of article 8 of the Constitution of the State, because the same is a special act conferring corporate powers; and also whether it is in conflict with section 19 of article 2 of the Constitution of the State because it contains more than one subject."

Indeed, we only propose to consider the first branch of this double question. Section 1, art. 8, of the Constitution of Nebraska of 1866–67, reads thus: "The legislature shall pass no special act conferring corporate powers."

The act of Feb. 2, 1875, is entitled "An Act authorizing School District Number 56, of Richardson County, to issue bonds for the purpose of erecting a school building, procuring a site therefor, and for setting apart a fund to pay the same."

It authorized the school board to issue bonds to the amount of $20,000, payable in ten or twenty years, with ten per cent. per annum interest, for that purpose, and required a vote of a majority of the electors of the district before they could be issued. It forbade the sale of these bonds at less than eighty-five cents on the dollar. It also enacted that all the penalties and forfeitures thereafter imposed, for any breach of the ordinances of Falls City, and all money for licenses to sell or traffic in liquors, or any other commodity or license to transact other business, should be paid over to the board of trustees of the school district, as well as all fines imposed by the police judge of said city.

The bonds on which the judgment in this case was rendered were issued under this act, and it was so recited on their face. That this was a special act is not denied. Nor can it be controverted successfully that it confers corporate powers. The power to make a contract of this character, to collect the taxes necessary to pay the debt, to contract for and superintend and pay for the building, to receive the fund mentioned from the authorities of Falls City, are all in their nature corporate acts when performed by a body possessing corporate powers.

The statutes of Nebraska then in force declare that "every duly organized school district shall be a body corporate, and possess all the usual powers of a corporation for public purposes." * * * "and may sue and be sued, purchase, hold, and sell such personal and

real estate as the law allows." The power conferred by the act of 1875 on School District No. 56 was conferred on a corporation, and was to be exercised by it as a corporation. It is, therefore, a corporate power, and was conferred, if at all, by a special act.

In response to this it is said that a school district is only a quasi corporation, and does not come within the constitutional provision. What is meant by the words "quasi corporation," as used in the authorities, is not always very clear. It is a phrase generally applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute, general or special.

Such is not the case here, for the language of the Nebraska statute makes school districts corporations in the fullest sense of the word.

It is next argued that the constitutional provision was only intended to apply to private corporations, as distinguished from those which are part of the body politic, such as counties and towns.

But we see no warrant for this distinction. There is certainly nothing in the words of the provision to suggest any such distinction or limitation. Nor do we see any reason why the local corporate bodies discharging public functions should not be governed by general and uniform laws as well as those for private enterprises. In fact, the weight of the argument seems to be the other way, for it can very well be seen that the aggregation of individual capital and energy into an associated organization may require different powers for each enterprise so established, while the powers to be exercised by cities, towns, townships, and school districts in the same State may or should be uniform in character all over the State. If any such rule is defensible at all, of which it is not our province to judge, its application to the latter class of corporations seems the more appropriate of the two.

The Constitution of the State of Ohio has a provision similar to that of the State of Nebraska relied on in this case. In the case of State v. Cincinnati, 20 Ohio St. 18, the Supreme Court of that State held that in the purview of the constitutional provision there was no distinction between private and municipal corporations. To the same effect is the decision of the same court in Atkinson v. M. & C. Railroad Co., 15 Ohio St. 21. The Supreme Court of Nebraska, in Clegg v. School District, 8 Neb. 178, held that the statute under which these bonds were issued was void, because forbidden by this clause of the State Constitution.

We are of opinion that this is a sound construction of the Constitution, and that, as to the first question certified to us, it must be answered that the act of Feb. 2, 1875, under which these bonds issued, is in conflict with the Constitution of the State, and is, therefore, void.

We are asked, however, to affirm the judgment because the bonds may be held valid under the powers conferred on school districts by the general statutes.

We are, however, of a different opinion. The general statute had other conditions for creating a debt than the special act mentioned on the face of these bonds. This statute provided a fund which might of itself be sufficient to pay the debt without resort to taxation. The vote of the electors might not have been obtained under the general statute. And as the bonds recite that they were issued under this act, and that the vote was taken under it, we cannot see that power purposed to be exercised under other and very different circumstances can be invoked to give validity to an act which is void by the authority under which it professed to be acting.

These views render it unnecessary to answer the other questions certified to us. The judgment of the Circuit Court will be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion. So ordered.[12]

BOSTON BEER CO. v. MASSACHUSETTS.

(Supreme Court of the United States, 1877. 97 U. S. 25, 24 L. Ed. 989.)

This was a proceeding in the Superior Court of Suffolk County, Massachusetts, for the forfeiture of certain malt liquors, belonging to the Boston Beer Company, and which had been seized as it was transporting them to its place of business in said county, with intent there to sell them in violation of an act of the Legislature of Massachusetts, passed June 19, 1869, c. 415, commonly known as the Prohibitory Liquor Law.[13] * * *

BRADLEY, J.[14] The question raised in this case is, whether the charter of the plaintiff, which was granted in 1828, contains any contract the obligation of which was impaired by the prohibitory liquor law of Massachusetts, passed in 1869, as applied to the liquor in question in this suit. * * *

The Supreme Court, in its rescript, expressly decides as follows: "Exceptions overruled for the reasons following:—The act of 1869, c. 415, does not impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals. The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the Legislature."

The judgment of the Superior Criminal Court was entered in conformity to this rescript, declaring the liquors forfeited to the Com-

[12] Compare Jones v. Habersham, 107 U. S. 174, at 188, 2 Sup. Ct. 336, 27 L. Ed. 401 (1882).

[13] Statement of facts abridged.

[14] A part of the opinion, dealing with a point of practice, omitted.

monwealth, and that a warrant issue for the disposal of the same. This is sufficient for our jurisdiction, and we are bound to consider the question which is thus raised.

As before stated, the charter of the plaintiff in error was granted in 1828, by an act of the Legislature passed on the 1st of February in that year, entitled "An Act to incorporate the Boston Beer Company." This act consisted of two sections. By the first, it was enacted that certain persons (named), their successors and assigns, "be, and they hereby are, made a corporation, by the name of The Boston Beer Company, for the purpose of manufacturing malt liquors in all their varieties, in the city of Boston, and for that purpose shall have all the powers and privileges, and be subject to all the duties and requirements, contained in an act passed on the third day of March, A. D. 1809, entitled 'An Act defining the general powers and duties of manufacturing corporations,' and the several acts in addition thereto." The second section gave the company power to hold such real and personal property to certain amounts, as might be found necessary and convenient for carrying on the manufacture of malt liquors in the city of Boston.

The general manufacturing act of 1809, referred to in the charter, had this clause, as a proviso of the seventh section thereof: "Provided always, that the Legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient."

A substitute for this act was passed in 1829, which repealed the act of 1809, and all acts in addition thereto, with this qualification: "But this repeal shall not affect the existing rights of any person, or the existing or future liabilities of any corporation, or any members of any corporation now established, until such corporation shall have adopted this act, and complied with the provisions herein contained."

It thus appears that the charter of the company, by adopting the provisions of the act of 1809, became subject to a reserved power of the Legislature to make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal the act, or any part thereof, establishing the corporation. This reservation of the power was a part of the contract.

But it is contended by the company that the repeal of the Act of 1809 by the Act of 1829 was a revocation or surrender of this reserved power.

We cannot so regard it. The charter of the company adopted the provisions of the Act of 1809, as a portion of itself; and those provisions remained a part of the charter notwithstanding the subsequent repeal of the act. The Act of 1829 reserved a similar power to amend

or repeal that act at the pleasure of the Legislature, and declared that all corporations established under it should cease and expire at the same time when the act should be repealed. It can hardly be supposed that the Legislature, when it reserved such plenary powers over the corporations to be organized under the new act, intended to relinquish all its powers over the corporations organized under or subject to the provisions of the former act. The qualification of the repeal of the Act of 1809, before referred to, seems to be intended not only to continue the existence of the corporations subject to it in the enjoyment of all their privileges, but subject to all their liabilities, of which the reserved legislative control was one.

If this view is correct, the Legislature of Massachusetts had reserved complete power to pass any law it saw fit, which might affect the powers of the plaintiff in error.

But there is another question in the case, which, as it seems to us, is equally decisive.

The plaintiff in error was incorporated "for the purpose of manufacturing malt liquors in all their varieties," it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

We do not mean to say that property actually in existence and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of Bartemeyer v. Iowa, 18 Wall. 129, 21 L. Ed. 929, was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The Legislature had no power to confer any such rights.

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that

it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302.

Since we have already held, in the case of Bartemeyer v. Iowa, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts.

Of course, we do not mean to lay down any rule at variance with what this Court has decided with regard to the paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several States, or otherwise. Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; License Cases, 5 How. 504, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 12 L. Ed. 702; Henderson v. Mayor of New York, 92 U. S. 259, 23 L. Ed. 543; Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550; Railroad Company v. Husen, 95 U. S. 465, 24 L. Ed. 527. That question does not arise in this case.[15] Judgment affirmed.

WEST RIVER BRIDGE CO. v. DIX et al.

(Supreme Court of the United States, 1847. 6 How. 507, 12 L. Ed. 535.)

Writ of error to the Supreme Court of Vermont, complaining of a judgment of that Court, sustaining a proceeding in the County Court, authorized under the laws of Vermont, by which the toll bridge of the West River Bridge Company was appropriated for a public highway, compensation being awarded to the Bridge Company, in manner and form prescribed by the laws of Vermont. The Bridge Company claims the laws under which its property was appropriated is repugnant to the tenth section of the first article of the Constitution prohibiting the passage of state laws impairing the obligation of contracts.[16]

McLEAN, J.[17] As this is a constitutional question of considerable

[15] See Eagle Insurance Co. v. Ohio, 153 U. S. 446, 14 Sup. Ct. 868, 38 L. Ed. 778 (1893).

[16] Statement of facts substituted.

[17] The concurring opinions of Justices Daniel and Woodbury and the dissenting opinion of Justice Wayne are omitted.

practical importance, I will state succinctly my general views on the subject.

The West River Bridge, under the statutes of Vermont, was appropriated to public purposes. And it is alleged that the charter under which the bridge was built and possessed by such appropriation was impaired. Our inquiry is limited to this point. For whatever injury the proceeding may have done to the interests of the corporation, unless its contract with the State was impaired, we have no jurisdiction of the case.

The power in a State to take private property for public use, is undoubted. It is an incident to sovereignty, and its exercise is often essential to advance the public interests. This act is done under the regulations of the State. If those regulations have not been strictly observed, that is not a matter of inquiry for this court. The local tribunals have the exclusive power in such cases.

This act by a State has never been held to impair the obligations of the contract by which the property appropriated was held. The power acts upon the property, and not on the contract. A State cannot annul or modify a grant of land fairly made. But it may take the land for public use. This is done by making compensation for the property taken, as provided by law. But if it be an appropriation of property to public use, it cannot be held to impair the obligations of the contract.

It is insisted, that this was a pretended exercise of the power of the eminent domain, with the view of destroying the force and obligation of the plaintiffs' charter.

This whole proceeding was under a standing law of the State, and it was sanctioned, on an appeal, by the supreme court of the State. A procedure thus authorized by law, and sanctioned, cannot be lightly regarded. It has all the solemnities of a sovereign act.

But it is said that the franchise of the plaintiff cannot be denominated property; that "it included the grant of no property, real or personal; that it lay in grant, and not in livery."

If the action of the State had been upon the franchise only, this objection would be unanswerable. The State cannot modify or repeal a charter for a bridge, a turnpike-road, or a bank, or any other private charter, unless the power to do so has been reserved in the original grant. But no one doubts the power of the State to take a banking-house for public use, or any other real or personal property owned by the bank. In this respect, a corporation holds property subject to the eminent domain, the same as citizens. The great object of an act of incorporation is, to enable a body of men to exercise the faculties of an individual. Peculiar privileges are sometimes vested in the body politic, with the view of advancing the convenience and interests of the public.

The franchise no more than a grant for land can be annulled by

the State. These muniments of right are alike protected. But the property held under both, is held subject to a public necessity, to be determined by the State. In either case, the property being taken, renders valueless the evidence of right. But this does not, in the sense of the constitution, impair the contracts. The bridge, and the ground connected with it, together with the right of exacting toll, are the elements which constitute the value of the bridge. The situation and productiveness of the soil, constitute the value of land. In both cases, an estimate is made of the value, under prescribed forms, and it is paid when the property is taken for public use. And in these cases the evidences of right are incidents to the property.

No State could resume a charter, under the power of appropriation, and carry on the functions of the corporation. A bank charter could not be thus taken, and the business of the bank continued for public purposes. Nor could this bridge have been taken by the State, and kept up by it, as a toll-bridge. This could not be called an appropriation of private property to public purposes. There would be no change in the use, except the application of the profits, and this would not bring the act within the power. The power must not only be exercised bona fide by a State, but the property, not its product, must be applied to public use.

It is argued that, if the State may take this bridge, it may transfer it to other individuals, under the same or a different charter. This the State cannot do. It would in effect be taking the property from A to convey it to B. The public purpose for which the power is exerted, must be real, not pretended. If in the course of time the property, by a change of circumstances, should no longer be required for public use it may be otherwise disposed of. But this is a case not likely to occur. The legality of the act depends upon the facts and circumstances under which it was done. If the use of land taken by the public for a highway, should be abandoned, it would revert to the original proprietor and owner of the fee.

It is objected that this bridge, being owned by a corporation, and used by the public, does not come within the designation of private property. All property, whether owned by an individual or individuals, a corporation aggregate or sole, is within the term. In short, all property not public is private.

The use of this bridge, it is contended, is the same as before the act of appropriation. The public use the bridge now as before the act of appropriation. But it was a toll-bridge, and by the act it is made free. The use, therefore, is not the same. The tax assessed on the citizens of the town, to keep up and pay for the bridge, may be impolitic or unjust; but that is not a matter for the consideration of this court.

It is supposed, if this power is sustained by the State of Vermont, it will be in the power of a State to seize the evidences of its indebt-

ment in the hands of its citizens, or within its jurisdiction, have their value assessed, and, by paying the amount, extinguish them. Such a case bears no analogy to the one before us. The contract only is acted upon in the case supposed. The obligation to pay the money by the State, is materially impaired which brings the case within the constitution. But the appropriation of property affects the contract or title by which it is held only incidentally. This, it is said, is an extremely technical distinction, and is not sustainable, as it enables a State to do indirectly what the constitution prohibits.

However nice the distinction may seem to be, when examined, it will be found substantial.

The power of appropriation by a State, has never been held by any judicial tribunal as impairing the obligation of a contract, in the sense of the constitution. And this power has been frequently exercised by all the States, since the adoption of the constitution. In the 5th article of the amendments to the constitution, it is declared: "Nor shall private property be taken for public use, without just compensation." This refers to the action of the federal government; but a similar provision is contained in all the state constitutions. Now, the constitution does not prohibit a State from impairing the obligation of a contract, unless compensation be made; but the inhibition is absolute. So that if such an act come within the prohibition, the act is unconstitutional. But this power has been exercised by the States, since the foundation of the government, and no one has supposed that it was prohibited by that clause in the constitution which inhibits a State "from impairing the obligations of a contract."

The only reasonable result, therefore, to which we can come is, that the power in the State is an independent power, and does not come within the class of cases prohibited by the constitution.

This view gives effect to the constitution in imposing a salutary restraint upon legislation affecting contracts, but leaves the States free in their exercise of the eminent domain, which belongs to their sovereignties, is essential for the advancement of internal improvements, and acts only upon property within their respective jurisdictions. The powers do not belong to the same class. That which acts upon contracts and impairs their obligation, only is prohibited.[18]

NOTE.—Legislative Control of Corporations, under the police power and the powers of eminent domain and taxation, is dealt with in Hall's Cases on Constitutional Law, American Casebook Series.

[18] Accord: Village of Hyde Park v. Oakwoods Cemetery Ass'n, 119 Ill. 141, 7 N. E. 627 (1886).

CHAPTER VII

DISSOLUTION

SECTION 1.—METHODS OF DISSOLUTION

MASON et al. v. SUPREME COURT OF EQUITABLE LEAGUE OF BALTIMORE CITY.

(Supreme Court of Maryland, 1893. 77 Md. 483, 27 Atl. 171, 39 Am. St. Rep. 433.)

FOWLER, J. The appellants filed a bill in the circuit court of Baltimore city against the appellee, a corporation formed under the general incorporation law of Maryland, and the prayer is that a receiver may be appointed to take charge of and administer the assets of the defendant corporation under the order of the court, and for an injunction restraining the officers and agents of said defendant from receiving or collecting any money or assessments due or coming to it, and from interfering with its property or assets, and for general relief. The defendant answered, testimony was taken, and a decree was passed dismissing the bill. The appellee is what is known as a "beneficial assessment association."

The first question is one of jurisdiction, and we are all of opinion that the learned judge below properly refused to appoint a receiver and issue the injunction on the allegations contained in the bill, for the granting of such relief would necessarily result in a dissolution of the corporation and a forfeiture of its charter.

The defendant was not alleged to be insolvent; certainly not so alleged as to bring the case within section 264 of article 23 of the Code; and, even if the allegation of insolvency had been sufficient, we find no proof to sustain it. Nor are there any allegations in the bill looking to proceedings under section 265 of the same article, providing for a voluntary dissolution.

Apart from statutory power, a court of equity cannot dissolve a corporation. "It is true," says Mr. High in his book on Receivers, (section 288,) "equity may properly compel officers of corporations to account for any breach of trust in their official capacity; yet, in the absence of statutes extending its jurisdiction, it will usually decline to assume control over the management of the affairs of a corporation upon a bill * * * alleging fraud, mismanagement, and collusion on the part of the corporate authorities, since such interference would

necessarily result in the dissolution of the corporation, and the court would thus accomplish indirectly what it has no power to do directly.

The remedial power exercised by courts of equity, in such cases, ordinarily extends no further than the granting of an injunction against any special misconduct on the part of the corporate officers; and, although the facts shown may be sufficient foundation for such an injunction, the court will not enlarge its jurisdiction by taking the affairs of the corporation out of the management of its own officers, and placing them in the hands of a receiver." We have quoted at length Mr. High's lucid statement of the well-settled principles applicable to a case like this, because, in our opinion, it is conclusive of the question we are considering. This court, however, has announced the same doctrine.

In Goodman v. Jedidjah Lodge, etc., 67 Md. 117, 9 Atl. 13, 13 Atl. 627, which was a bill filed by a minority of the members of a beneficial association, alleging fraud, mismanagement, etc., on the part of the corporate authorities, it was held that, even if the corporation had been guilty of the acts complained of, this would only be cause for the annulment of its charter by the legislature, or for proceedings against it as provided by the corporation laws. Rev. Code, p. 684, art. 67, §§ 1–9. A corporation can also be dissolved, but the mode for doing this is also provided by law. Id. §§ 10–22.

"But," continues this court, "this bill is not a proceeding under either of these provisions of the Code, and the court has no power upon such a bill either to dissolve the corporation, or to forfeit its charter, or to correct any supposed misuse or abuse of its corporate powers, and it seems to us that the successful prosecution of one or the other of these remedies is essential to the relief asked by these complainants."

But if the defendant corporation has, as alleged, issued or made contracts of insurance, this, if an abuse of corporate power, could not be reached by a bill, like the one before us, filed by a member or certificate holder for the dissolution of the corporation; but such proceedings for such purpose must, under the provisions of Code, art. 23, § 255, be instituted in the name of the state by authority of the governor.

We may add, however, that, aside from any question of jurisdiction, we do not think the appellants are entitled to the relief asked, upon the facts contained in this record.

The testimony as to insolvency, mismanagement, fraud, and abuse of corporate powers is not of such a satisfactory and conclusive character as would justify the court, if it had the power, in destroying the corporation. Railroad Co. v. Cannon, 72 Md. 493, 20 Atl. 123. The appellants had ample opportunity to enforce their alleged rights and claims. If they were unjustly excluded from the benefits and privileges of membership, the rules of the order provided a mode by which they could demand restoration at the hands of a tribunal established

by the order itself, (section 310, art. 7, Constitution of the Order;) and, if they failed to get justice within the order, they still had the right to appeal to the law of the land.

If the officers of the order should be guilty of misconduct, fraud, or mismanagement, a court of equity has full power to restrain and enjoin them; but it will not, as we have seen, take away the rights of the share or certificate holders, either by dissolving the corporation or by placing its affairs in the hands of a receiver. High, Rec. § 288; Waterbury v. Express Co., 50 Barb. (N. Y.) 166; Railroad Co. v. Cannon, 72 Md. 493, 20 Atl. 123.

Decree affirmed, with costs to appellants.

NEW YORK & L. I. BRIDGE CO. v. SMITH et al.

(Court of Appeals of New York, 1896. 148 N. Y. 540, 42 N. E. 1088.)

BARTLETT, J.[1] The main question presented by this appeal is whether the New York & Long Island Bridge Company was, at the time this proceeding was instituted, an existing corporation duly authorized to acquire title to the land of the defendant Smith, for the purposes of constructing the bridge and its approaches.

The learned counsel for the appellant rests his attack upon the corporate existence on various distinct grounds, and a proper consideration of them involves a full examination of the legislation under which the bridge company claims the right to maintain ths proceeding.

The appellant takes a preliminary point which, if sound, would require a reversal of the order appealed from, and a dismissal of this proceeding.

The act incorporating the bridge company (chapter 395, Laws 1867) provides in the twelfth section thereof that the bridge shall be commenced within two years from the passage of the act, and shall be continued without unreasonable delay, until it is completed, "or this act and all rights and privileges granted hereby shall be null and void."

It is the contention of appellant's counsel that this forfeiture clause is self-executing, and, as it is admitted that the work was not commenced within two years from the passage of the act, the bridge company, ipso facto, ceased to exist.

We are referred to a large number of authorities as sustaining this position, and, among others, to several cases in this court.

It is to be observed that the question as to whether a forfeiture clause is or is not self-executing depends wholly upon the language employed by the legislature.

Our attention is called particularly to In re Brooklyn, W. & N. Ry. Co., 72 N. Y. 245, and Brooklyn Steam Transit Co. v. City of Brooklyn, 78 N. Y. 524.

[1] Facts sufficiently stated in the opinion, a part of which is omitted.

In the first case the words of forfeiture were, "Its corporate existence and powers shall cease," and this court held that upon default the corporation's existence and powers ceased, without judicial proceedings. In the second case the words of forfeiture were, "This act and all the powers, rights, and franchises herein and hereby granted shall be deemed forfeited and terminated," and this court held the clause to be self-executing, thereby recognizing the undoubted power of the legislature to provide that corporate existence shall cease by the mere fact of failure of the corporation to perform certain acts imposed by the charter.

It requires, however, strong and unmistakable language, such as each of the cases referred to presents, to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings on the intervention of the attorney general.

In the case at bar the words of forfeiture are, "All rights and privileges granted hereby shall be null and void."

It cannot be said that the words "shall be null and void" disclose the legislative intent to make this clause self-executing. The words "null and void," as used in this connection, clearly mean voidable. The word "void" is often used in an unlimited sense, implying an act of no effect, a nullity ab initio. Inskeep v. Lecony, 1 N. J. Law, 112. In the case at bar it was not so employed, but rather in its more limited meaning.

We think these words mean no more than if the legislature had said, in case of default, the corporation "shall be dissolved." The attorney general was authorized to treat the charter of the bridge company as voidable, and, by appropriate legal proceedings to have terminated its corporate existence.

The supreme court of the United States, in passing upon the meaning of the words "void and of no effect," uses this language: "But these words are often used in statutes and legal documents * * * in the sense of 'voidable' merely,—that is, capable of being avoided,—and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances." Ewell v. Daggs, 108 U. S. 148, 2 Sup. Ct. 408, 27 L. Ed. 682.

Holding, as we do, that the forfeiture clause in the act of 1867 was not self-executing, we find, in the various acts amending the act of 1867, repeated waivers by the legislature of the failure of the bridge company to begin its work within two years from the passage of the act of 1867. * * * Order affirmed.[2]

[2] Compare Oakland Ry. Co. v. Oakland Brooklyn Ry. Co., 45 Cal. 365, 13 Am. Rep. 181 (1873).

STATE SAVINGS ASS'N OF ST. LOUIS v. KELLOGG et al.

(Supreme Court of Missouri, 1873. 52 Mo. 583.)

WAGNER, J.[a] This was an action against the defendants, as stockholders of the Southwestern Freight & Cotton Press Company. The petition alleges the organization of the company as a corporation under the laws of this State, its existence as such corporation in 1869, its becoming indebted to plaintiff in the same year, and its dissolution in June, 1869. The averment is that in June, 1869, the said corporation became wholly insolvent and bankrupt, and presented its petition to the United States District Court and was in that month declared a bankrupt, and was totally without funds or means, whereby it became dissolved being unable by reason of a total want of funds and means to exercise its corporate powers.

The answer of the defendants denies that they or either of them are in any manner liable to the plaintiffs, but there is no denial of the insolvency of the incorporation. At the trial plaintiff proved the indebtedness of the corporation as stated in the petition. The case was then submitted on the pleadings and proofs, and at the request of the defendants the court declared the law to be, that the plaintiffs could not recover. This action was brought under the statute (1 W. S. p. 293, § 22) which declares, if any company formed under this act dissolve leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the company in such suit.

The first question is, whether the insolvency of the company amounted to a dissolution so as to give the plaintiffs the right to pursue this remedy.

In the case of Moore v. Whitcomb, 48 Mo. 543, it was held that a corporation might be dissolved by a surrender of its franchises, and if it suffered acts to be done which had the effect of destroying the end or object for which it was created, it was equivalent to a surrender of its rights and in effect a dissolution.

In the above cited case we mainly followed the leading case of Slee v. Bloom, 19 Johns. 456, 10 Am. Dec. 273, where the question is most thoroughly examined in the Court of Errors, in the State of New York. In that case it appears that pursuant to a statute the defendants associated together for establishing a cotton manufactory, and became a corporation according to the provisions of the statute. For the space of one month there was no meeting of the trustees, nor any business or act done by the corporation; then all the property of the corporation real and personal was sold by the sheriff under an execution. Shortly thereafter the plaintiff, a creditor of the corporation, filed his bill against the defendants to charge them under

[a] Facts sufficiently stated in the opinion, a part of which is omitted.

the provisions of the act, as individually responsible for the debts of the corporation to the extent of their respective shares of stock, alleging that the corporation was to be considered as dissolved after the selling of all its property by the sheriff.

The court held that the corporation within the meaning and intent of the act, as regarded creditors, was dissolved, after ceasing to act as a corporation for such a length of time, and after a sale of all its property, and that the defendants were individually responsible for the debts of the corporation according to the act.

In the course of his able opinion Chief Justice Spencer said: "In point of good sense, this corporation was dissolved within the meaning and intent of the act, as regards creditors when it ceased to own any property, real or personal, and when it ceased for such a space of time, from doing any one act manifesting an intention to resume their corporate functions. The end, being and design of the corporation were completely determined, and if even it had the capacity to reorganize and re-invigorate itself, the case has happened when, as relates to its creditors, it is dissolved." The learned judge continued that, with respect to the period of dissolution it happened when all the property of the company was sold and that after that time no corporate act was done. So in Penniman v. Briggs, Hopk. Ch. (N. Y.) 300; s. c., 8 Cow. (N. Y.) 387, 18 Am. Dec. 454, where a manufacturing corporation, established under the same general law as that just alluded to, for twenty years, became insolvent within the time, and incompetent to act by the loss of all its funds, and under the provisions that "for all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing the company should be individually responsible to the extent of their respective shares of stock in the company and no further," it was decided that the corporation was to be deemed dissolved for the purpose of the remedy by the creditors against the stockholders individually.

It may be admitted that the old and well established principle of law remains good as a general rule, that a corporation is not to be deemed dissolved by reason of any mis-user or non-user of its franchises, until the default has been judicially ascertained and declared. But it must be observed, that the plaintiff has no control over the process or remedy to dissolve this corporation, either for non-user or for any other cause. It is necessary that the State through its law officer should institute such proceedings. Then if we are to consider this corporation in existence, the plaintiff as a creditor before it can have any remedy, must wait till the charter expires by limitation of time, or until the law officer of the State shall see fit to institute proceedings to vacate it; which may never happen. In the meantime the creditor is wholly remediless. A doctrine so unreasonable, ought not to find any sanction or support.

Now the averment in the petition was that when the company presented its petition to the United States District Court, it was dissolved,

being wholly unable, by reason of a total want of funds and means, to exercise its corporate powers. The answer admitted the total want of funds and means, the absolute destitution of assets, but denied the legal inference that the corporation was thereby dissolved within the meaning or sense in which that word is used in the statute.

When the corporation was utterly penniless, for what end or object did it continue? What good did it do the creditor to be told that there was the naked shadow but that the substance was all gone? The corporation for all essential purposes was as effectually dissolved as if a solemn judgment of court had been pronounced to that effect. I have no hesitation in coming to the opinion that there was such a dissolution as would afford creditors a remedy against the individual shareholders. * * *

I am of the opinion the judgment should be reversed, and the cause remanded. The other judges concur, except Judge SHERWOOD, who is absent.[4]

BOSTON GLASS MANUFACTORY v. LANDGON.

(Supreme Judicial Court of Massachusetts, 1834. 24 Pick. 49, 35 Am. Dec. 292.)

Assumpsit on a promissory note given by the defendant to the plaintiffs. The defendant pleads in abatement, that at the time of the purchase of the writ there was not, and now is not, any such corporation established by law, called the Boston Glass Manufactory, as in and by the writ is supposed. The plaintiffs' reply that there was and is such a corporation; and tender an issue; which is joined.

To sustain the defence evidence was introduced showing an assignment by the corporation for the benefit of creditors executed May 27th, 1827; also a failure to hold annual meetings or transact business subsequent to such assignment.

The jury were instructed that the evidence was competent to prove the establishment and continuance of the corporation down to the present time.

The jury found a verdict for the plaintiffs for the full amount of the note and interest. The defendant excepted to the rulings of the Court and moved for a new trial.[5]

MORTON, J.[6] The non-existence or death of the plaintiff may properly be pleaded in abatement. 1 Chit. Pl. 482; Story, Pl. 24. But whether, as it entirely and perpetually destroys the plaintiff's right to recover, it may not also be pleaded in bar, it is not necessary to determine. Proprietors of Monumoi v. Rogers, 1 Mass. 159; First

[4] Contra: Chamberlin v. Huguenot Mfg. Co., 118 Mass. 532 (1875); Scheuer v. Smith & Co., 112 Fed. 407, 50 C. C. A. 312 (1901).

[5] Statement of facts substituted.

[6] Shaw, C. J., did not sit in the cause.

Parish in Sutton v. Cole, 3 Pick. 245. Whether the plea conclude in abatement or bar, the issue being found against the defendant, the judgment must be peremptory. The established rule is, that in dilatory pleas, when the issue is found against the defendant on matters of fact, the judgment must be in chief. Gould, Pl. 300; Howe, Prac. 215.

The principal question for our consideration is, whether judgment shall be rendered on the verdict. The defendants' counsel contends that the evidence introduced will not support the verdict, but that the verdict is against the evidence and the law and should be set aside.

The point which has been determined by the jury, though necessary to be submitted to them with proper instructions, is quite as much a matter of law as of fact; and we the more readily enter into the examination of it.

The legal establishment and due organization of the corporation were admitted; but it was contended that the facts disclosed showed a dissolution of it.

The elementary treatises on Corporations describe four methods in which they may be dissolved. It is said that private corporations may lose their legal existence by the act of the legislature; by the death of all the members, by a forfeiture of their franchises; and by a surrender of their charters. 2 Kyd, Corp. 447; 1 Bl. Comm. 485; 2 Kent, Comm. (1st Ed.) 245; Ang. & A. Corp. 501; Oakes v. Hill, 14 Pick. 442. No other mode of dissolution is anywhere mentioned or alluded to.

1. In England, where the parliament is said to be omnipotent, and where in fact there is no constitutional restraint upon their action, but their own discretion and sense of right, corporations are supposed to hold their franchises at the will of the legislature. But if they possess the power to annul charters, it certainly has been rarely exercised by them. In this country, where the legislative power is carefully defined by explicit fundamental laws, by which it must be governed and beyond which it cannot go, it has become a question of some difficulty, to determine the precise extent of their authority in relation to the revocation of charters granted by them. But as it is not pretended that there has been any legislative repeal of the plaintiffs' charter, it will not be useful further to discuss this branch of the subject.

2. As all the original stockholders are not deceased, the corporation cannot be dissolved for the want of members to sustain and exercise the corporate powers. Besides, this mode of dissolution cannot apply to pecuniary or business corporations. The shares, being property, pass by assignment, bequest, or descent, and must ever remain the property of some persons, who of necessity must be members of the corporation, as long as it may exist.

3. Although a corporation may forfeit its charter by an abuse or misuser of its powers and franchises, yet this can only take effect upon a judgment of a competent tribunal. 2 Kent, Comm. (1st Ed.) 249;

Corporation of Colchester v. Seaber, 3 Burrows, 1866; Smith's Case, 4 Mod. 53. Whatever neglect of duty or abuse of power the corporation may have been guilty of, it is perfectly clear that they have not lost their charter by forfeiture. Until a judicial decree to this effect be passed, they will continue their corporate existence. King v. Amery, 2 Term R. 515.

4. Charters are in many respects compacts between the government and the corporators. And as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal solemn act of the corporation; and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve, that there was to form the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act, would be a dangerous power and one which cannot be supposed to exist.

But there is nothing in this case which shows an intention of the corporators to surrender or forfeit their charter, nor anything which can be construed into a surrender or forfeiture.

The possession of property is not essential to the existence of a corporation. 2 Kent, Comm. (1st Ed.) 249. Its insolvency cannot, therefore, extinguish its legal existence. Nor can the assignment of all its property to pay its debts, or for any other purpose, have that effect. The instrument of assignment was not so intended, and cannot be so construed. All its provisions look to the continuance of the corporation. It contains covenants that the assignees may use the corporate name for the collection of the debts and the disposition of the property assigned; that the corporation will not hinder or obstruct them in the performance of these functions; that it will make any further conveyances and assurances which may become necessary, and will do and perform any other and further acts which may be required to enable the assignees fully to execute their trust. The instrument which covenants for future acts cannot be construed to take away all power of action.

The omission to choose directors clearly does not show a dissolution of the corporation. Although the proper officers may be necessary to enable the body to act, yet they are not essential to its vitality. Even the want of officers and the want of power to elect them, would not be fatal to its existence. It has a potentiality which might by proper authority be called into action, without affecting the identity of the corporate body. Corporation of Colchester v. Seaber, 3 Burrows, 1870.

But here in fact was no lack of officers. Although no directors had been chosen for several years, yet, by the by-laws of the corporation,

the directors, though chosen for one year, were to continue in office till others were chosen in their stead.

The damages were properly assessed by the jury. The defendant having elected to try her case upon a plea in abatement, must submit to the legal consequences of that form of trial. Perhaps the court might have assessed the damages as in case of default. But most obviously the better course was to submit the subject to a jury. In doing this the defendant could not be allowed to go into the whole defence as upon the general issue. The rule adopted at the trial was the correct one.

Judgment according to verdict.[7]

NEWTON MFG. CO. v. WHITE et al.

(Supreme Court of Georgia, 1871. 42 Ga. 148.)

LOCHRANE, C. J.[8] This was an action brought by the Whites against the plaintiff in error, for the recovery of certain cotton, alleged to have been received by them under contract. The record is voluminous and embraces the evidence of many witnesses upon questions of fact, found by the jury. We do not propose to review the testimony, as the controlling question of the case turns upon the law governing corporations, and its application to the theory of defense relied on by the defendant below.

The action was brought in the ordinary form of assumpsit, to the March Term of Newton Superior Court. The return of the sheriff upon the 26th February, 1867, is: "I have this day served Newton Manufacturing Company with a copy of this writ, by leaving it at their most notorious place of business." At the proper term the defendant appeared by counsel and pleaded the general issue. Upon these pleadings the case went to the jury, and a verdict was found for the plaintiff. An appeal was entered, and when the case came on for trial, the defendant pleaded "that at the time of the several supposed promises and undertakings, etc.: to wit: in the year 1865, and for several years previous thereto, to-wit: the year 1861, the defendant was not using or exercising any of the franchises conferred by its charter, that it had no officers or agents, appointed in accordance with its by-laws, and was not capable of making contracts or performing any of the functions of its corporate existence, but on the contrary was dormant or in a state of suspension," etc. The Court below held that this plea was filed too late, and disallowed any evidence under it, showing, as a corporation, it was incapable of making the contract or was not operating within the forms of a charter.

[7] See Attorney General v. Superior & St. Croix Ry. Co., 93 Wis. 605, 67 N. W. 1138 (1896).

[8] Facts sufficiently stated in the opinion, a part of which is omitted.

The jury found for the plaintiffs, and a motion for a new trial on several grounds, was made and overruled by the Court, and the case comes before us by exceptions to the judgment of the Court refusing a new trial.

This corporation was created under the Act of 1847, Cobb's Digest, 439, and is found under the classification of "Joint Stock Companies." The parties, associating under this general Act of the Legislature, as the "Newton Manufacturing Company," it appears by the record, originally consisted of eight persons, who published, by requirement of the law, their association. In this manner the company began business, and W. R. Phillips in 1863, by purchase of the stock, became exclusive owner and controlled the Factory. Did this concentration of the stock in the hands of one single owner destroy the corporate rights and franchises of the "Newton Manufacturing Company"? Under the peculiar character of this association, under the law, we do not feel authorized to hold that such a purchase necessarily destroyed the franchise; the object of the association was to carry on business under a corporate name; and when we find that the business was continued under that name, no matter whether there was one or one hundred owners of stock, the corporate name was equally within the power of the one as of the one hundred to use and to carry on the business. "Nor was it necessary that by-laws in fact should have been made, or officers elected. These powers could or could not be exercised at the option of the owner or owners of the stock, and property of said company." All such rules and regulations for the government of the business was a matter between the parties in interest, and except published or brought to the notice of strangers, did not affect them: Code, § 1679. And the fact that, in an association under the Act of 1847, one of the stockholders finally buys up and owns all the stock and property of the balance, and the whole lodges in him, does not deprive such person from the use and rights of the charter, to carry on the business, under the name adopted; and the fact of being the sole owner, if he goes on, and uses such name, does not abate suits at law or equity filed against such corporation, although individual property.

No corporation once legally existing dies, in contemplation of law, without some act forfeiting its franchises, but it will be recognized by the law, as long as it carries on its legitimate business, in its corporate name, and through agents and persons who use that name in its trade or business. It would be an anomalous doctrine, that one should purchase all the stock of such a joint stock company, privately, and without giving notice of such ownership, should carry on the business, use the corporate name, brands, stamps and trade-marks, and keep books in its name, buy and sell in its name, and be permitted to plead its dissolution, when sued by the very name in which it contracted, in violation of the terms of its existence, that it could sue and be sued by that name. Every corporation speaks by men, and its artificial ex-

istence blends with that of its agents and officers. The corporate name is nothing without the living men who use that name; but when used by those who are its proper agents, it is liable by that name to suit under the provisions of its charter. The position this case occupies from the evidence is, that the Newton Manufacturing Company continued to do business, under its corporate name, its agents contracted, in its name, with the plaintiffs, the receipt was in its name, and it was not dead nor dormant so far as the parties to this case are concerned. If it was alive to make this contract, the right of suit continues until the liability is discharged.

If Mr. Phillips had, after his purchase of the stock, done business openly in his own name, this would have ended the corporate name. But from this record he used the corporate name to transact the business. Pennington swears that he gave receipts for Newton Manufacturing Company under the order of Phillips: "he directed me to sign for Newton Manufacturing Company," not for "W. R. Phillips," that he did not want it known that he was the "Newton Manufacturing Company." Every witness in the case substantially sustains this material fact, and we, therefore, are of the opinion that, inasmuch as the Newton Manufacturing Company went on under its name to transact its business, it was liable, in that name, to sue and be sued, and it was not error in the Court to disallow testimony of its dormancy, under the pleadings. * * *

Judgment affirmed.[9]

ATLANTIC & G. R. CO. v. GEORGIA.

(Supreme Court of the United States, 1878. 98 U. S. 359, 25 L. Ed. 185.)

The single question presented is whether a statute of the state of Georgia, providing that "the property of railway companies shall be taxed the same as that of other property of the people of the state," impairs the obligations of the contract contained in the charter of the plaintiff in error. The latter company is a result of a consolidation of two companies, authorized by the laws of the state, and succeeding to the privileges and immunities of the constituent companies; the contention being that the special form of taxation for the constituent companies, contained in their charters, became a part of the charter of the plaintiff in error, and is impaired by the act complained of.[10]

STRONG, J.[11] * * * It is conceded that under this act a consolidation took place. It is, therefore, a vital question, What was its

[9] Accord: Russell v. McLellan, 14 Pick. (Mass.) 63 (1833). Compare Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336 (1886); Louisville Banking Co. v. Eisenman, 94 Ky. 83, 21 S. W. 531, 1049, 19 L. R. A. 684, 42 Am. St. Rep. 335 (1894).

[10] Statement of facts substituted.

[11] A part of the opinion is omitted.

effect? Did the consolidated companies become a new corporation, holding its powers and privileges as such under the act of 1863? Or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by another, whereby the former was dissolved, while the latter continued to exist? The answer to these inquiries must be found in the intention of the legislature as expressed in the consolidating act. We think that intention was the creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of Central Railroad & Banking Co. v. Georgia, 92 U. S. 665, 23 L. Ed. 757. Nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence, as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies, thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company; and, if so, how could either have a continued separate being? True, the proviso to the first section declared that nothing therein contained should relieve or discharge either of the companies from any contract theretofore entered into by either, adding: "But this company [that is, the company created by the act] shall be liable on the same."

It is thus distinguished between the two original companies and the one contemplated to be formed by their consolidation. And the proviso would have been quite unnecessary, had it not been thought by the legislature that the consolidation would work a dissolution of the amalgamated companies. Hence it was considered necessary to preserve the rights of parties who might have contracted with them. Only their contracts were mentioned in the proviso, and that in order to authorize a novation. The third section continued in force the several immunities, franchises, and privileges granted by the original charters and the amendments thereof, and the liabilities therein imposed, but plainly for the benefit of the consolidated companies. Why speak of original charters, if a later charter was not intended by the act? That such was the intention appears still more clearly in the third section. That conferred upon the consolidated stockholders complete corporate powers. It granted to them, when consolidated, not only a corporate name, but the right under that name to acquire and hold property, to sue and be sued, to have a common seal, to make by-laws, and generally to do every thing that appertains to corporations of like character. This full grant of corporate power must have been intended for some purpose. What was it, if not to create a corporation? For that purpose it was amply sufficient. For any other it was unmeaning. If the two original companies were to continue in being, if it was not contemplated that they should be dissolved by consoli-

dation, a new grant of corporate power and existence was unnecessary. They had it already.

Looking thus at the legislative intent appearing in the consolidation act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities, or privileges it possesses, it holds them solely by virtue of the grant that act made. That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In McMahan v. Morrison, 16 Ind. 172, 79 Am. Dec. 418, the effect of a consolidation was said to be "a dissolution of the corporation previously existing, and, at the same instant, the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence." So in Lauman v. Lebanon Valley Railroad Co., 30 Pa. 42, 72 Am. Dec. 685, the court said: "Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old as enter into the new." This court, in Clearwater v. Meredith, 1 Wall. 40, 17 L. Ed. 604, expressed its approval of what was said in the former of these cases. It is true these expressions have not all the weight of authority, for they were not necessary to the decisions made, but they are worthy of consideration, and they are in accordance with what seems to be sound reason.

When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or quasi partners, in a new concern. Each set of stockholders is shorn of the power which, as a body, it had before. Its action is controlled by a power outside of itself. To illustrate: The stockholders of the Savannah and Albany Railroad Company could not, after consolidation, have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic and Gulf Railroad Company. They could not have built their road or controlled its management. They could not, therefore, have performed the duties which by their original charter were imposed upon them. Those duties could only have been performed by another organization, composed partly of themselves and partly of others. Their powers, their franchises, and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities, and privileges by virtue of the consolidation act. What, then, was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. But the new company

comes into existence under a fresh grant. Not only its being, but its powers, its franchises, and immunities, are grants of the legislature which gave it its existence.

If, then, the old Atlantic and Gulf Railroad Company and the Savannah, Albany, and Gulf Railroad Company went out of existence when their stocks were consolidated under the act of the legislature of 1863, their powers, their rights, their franchises, privileges, and immunities ceased with them, and they have no existence except by virtue of the grant of corporate powers and privileges made by the consolidation act of 1863. That act created a new corporation, and endowed it with the several immunities, franchises, and privileges which had previously been granted to the two companies, but which they could no longer enjoy. * * * Judgment affirmed.[12]

SECTION 2.—CAUSES FOR DISSOLUTION

STATE ex rel. SCOTT v. UNITED STATES ENDOWMENT & TRUST CO.

(Supreme Court of Alabama, 1903. 140 Ala. 610, 37 South. 442, 109 Am. St. Rep. 60.)

Appeal from City Court of Anniston.

The proceedings in this case were in the nature of quo warranto, and were instituted by the state upon the information of Thomas K. Scott, filing his petition addressed to the judge of the city court of Anniston against the United States Endowment & Trust Company, for the purpose of having the charter of said corporation, which was granted by a special act of the Legislature, declared forfeited and annulled.

The relator in the cause is described as a resident citizen of the state of Georgia, and it is not disclosed in the petition that he has any interest, financially or otherwise, in the defendant corporation.

The petition avers the granting of the charter to the United States Endowment & Trust Company of Anniston by an act of the General Assembly approved March 4, 1901 (Acts 1900-01, p. 2264), and then avers the substance of the several sections of an act granting said charter. There were averred in the petition many grounds why the charter of said corporation should be forfeited, but the grounds insisted upon were as follows: (1) That there was a failure on the part of respondent to have its principal office and place of business in Anniston, Ala., as was provided by its charter. (2) That the president of

[12] See accord: Clearwater v. Merdith, 1 Wall. 25, 17 L. Ed. 604 (1863), Keokuk & Western Ry. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450 (1894); Jones v. Missouri-Edison Electric Co. (C. C.) 135 Fed. 153 (1905).

the respondent had failed to file an annual report of the affairs of the corporation to the state auditor, as was required by section 13 of the act incorporating said respondent. (3) That the respondent had abused its powers and acted contrary to the interest of its stockholders by the purchase of a building in the city of Anniston at an excessive valuation, in payment for the stock of some of its stockholders and its managing agent. (4) That its board of directors had failed by rule or by-law to regulate the time for paying the subscription to the capital stock, and had not called for the payment of the subscriptions to its capital stock within a reasonable time after its organization. * * *

A demurrer to the bill was overruled. The defendant answered denying the general averment of the bill; also setting up facts tending to show no prejudice to stockholders or those in interest by reason of the acts complained of. The court gave judgment for the defendant. Appeal based on alleged erroneous rulings of the trial court.[13]

TYSON, J.[14] [The court, after considering certain questions of practice proceeds:]

This brings us to a consideration of the merits of the controversy. The first contention, upon which is rested the right to have a judgment of ouster entered against the respondent excluding it from a further exercise by it of the franchise conferred by the charter, is that it did not, prior to April, 1903, maintain its principal office in the city of Anniston.

Respondent derived its corporate existence under an act of the General Assembly approved March 4, 1901. Acts 1900-01, p. 2264. Section 3 provides: "That the principal office of said company shall be in the city of Anniston, Alabama, but it shall have power and authority to establish agencies and branch offices in other counties of said state, and in other states in the United States, and appoint agents therein, and generally to do and perform all those things which may be necessary and proper to the proper conduct of its business and to carry out the objects and purposes as in this act are authorized to be done and performed."

Section 11 provides for the government of the corporation by a board of directors, who are clothed with authority to elect its officers.

Section 12 provides: "That the annual convention of stockholders, shall be held in the city of Anniston in said state; but the board of directors may meet at any other branch office or agency of said company upon due notice and when two-thirds of said directors shall meet at the time, signified and to be named in the call for such meeting, their acts and doings shall be as valid and binding as if such meeting were held at the home office."

[13] Statement of facts abridged.

[14] A part of the opinion is omitted.

Section 13 makes it the duty of the president of the company to make an annual report to the Auditor of the State, under oath, showing "the capital and assets of the company, the number and amount of debentures, bonds and annuities outstanding, and the amount of reserve set apart to meet the same and how and in what manner said reserve is invested and maintained."

It appears from the first section of the act that all of the incorporators of the company, five (5) in number, were residents of the state of Georgia, except John B. Knox, of Calhoun county, in this state.

It appears from the testimony that after the organization of the company it established an office in the city of Anniston, but that all of its officers except its general counsel, who was also one of its directors, resided in the city of Atlanta, where it also had an office, and that its books were kept there until April, 1903. Since April, 1903, all of its managing officers have resided in the city of Anniston, and all of its books have been kept in its office in that city. It also appears that in July, 1901, the company purchased and became the owner of a valuable piece of property in the city of Anniston which it now owns. Conceding that the requirements put upon the company of having its principal office in the city of Anniston is of the essence of the contract between the state and the corporation, its violation by the company is not expressly made a ground of forfeiture in the charter, and, if a ground at all, it must be upon the theory that the charter expressly imposes it as a duty, without providing in so many words that a violation thereof shall be a cause of forfeiture, or that it is an implied condition resting upon the corporation by virtue of its acceptance of the charter. Whether it be the one or the other, courts are clothed with a discretion which they may exercise, even though there may have been a violation by the corporation of the charter contract, in declaring a forfeiture, if the interest of the public do not demand such a judgment. 2 Morawetz on Private Corporations (2d Ed.) § 1028; note by Mr. Freeman in 8 Am. St. Rep. 181, in which are cited the following cases, viz.: State v. Oberlin Building & Loan Association, 35 Ohio St. 258; State v. People's Mut. Ben. Association, 42 Ohio St. 579; State v. Minnesota Central Railway, 36 Minn. 246, 258, 30 N. W. 816; State v. Crawfordsville, etc., Turnpike Co., 102 Ind. 283, 289, 1 N. E. 395; State v. Essex Bank, 8 Vt. 489.

An examination of these cases will disclose that they fully support the learned annotator in his statement that: "If a corporation is found guilty of acts or omissions which are expressly declared to be a cause of forfeiture of its franchise, plainly a court has no discretion to refuse such a judgment; * * * but in other cases the court is vested with a discretion, and may refuse a judgment of ouster, if, in its opinion, the interests of the public do not require such a judgment." This principle was clearly recognized by the court in Capital City Water Co. v. Macdonald, 105 Ala. 425, 426, 18 South. 62, 29 L.

R. A. 743, notwithstanding the facts of that case did not authorize the exercise of the court's discretion in favor of the respondent corporation. So, then, if it be conceded that the respondent is shown to have been guilty of a violation of its charter in respect of not having its principal office in the city of Anniston for the period of time pointed out above, ought this court in the exercise of its sound discretion, forfeit its franchise? We think not. This information was filed on November 7, 1903. For more than six months prior thereto the respondent had met with the requirements of this provision of its charter, even to the full measure of its duty according to relator's conception of it. And prior to this period it had only violated its duty, according to relator's conception of it, by not keeping its books in its office at Anniston and one of its managing agents there in charge of them. It may be seriously doubted that such was its duty, in view of section 12 and other provisions of its charter. But, however this may be, its violation is shown to have been without prejudice to any citizen of the state or any other person. It has all along been solvent, and during that period it practically did no business in this state. No person ever brought a suit against it in this state until the filing of this information, nor does it appear that any person had any cause to bring suit.

To deprive it of its right to enjoy its franchise would doubtless entail loss upon its stockholders, a penalty that should not be imposed upon them when no public good would be subserved by it. And especially is this true when it cannot be affirmed without some misgivings that they have not been guilty of a willful abuse of the franchise granted to them.

The only other matter insisted upon as a ground of forfeiture is the failure of respondent's president to make an annual report to the Auditor, as required by section 13 of the charter act. Relator contends that the company was fully organized in July, 1901, and that no report was made until November 1, 1902. In this statement he appears to be sustained by the record. The report that was filed was clearly such as is required by section 13, as was the second report made in November, 1903.

If it be admitted that an entire failure to comply with this provision of the charter would be a ground of forfeiture—a proposition about which the courts do not seem to be in harmony—it does not appear that the omission here complained of was willful or intentional. Indeed the making of the report in November, 1902, and the making of the second annual report in November, 1903, would indicate that its president was mistaken as to the time when he should have made his first annual report, or that his omission to make it within the 12 months after his company was organized, if it be admitted that this limitation as to time began to run from that date rather than from the date the company commenced to do business, was merely an oversight, and not attributable to willful or intentional misconduct. "It is

to be observed that courts proceed with extreme caution in proceedings which have for their object the forfeiture of corporate franchises, and a forfeiture will not be allowed except upon express limitation, or for a plain abuse of power by which the corporation fails to fulfill the design and purpose of its organization." State ex rel. Johnson v. Southern B. & L. Association, 132 Ala. 50, 57, 31 South. 375. Furthermore, "Substantial performance of conditions is all that is required." Freeman's note, supra.

Several exceptions were reserved during the trial to the admission of testimony. It is, however, unnecessary to pass upon these, since, with this testimony excluded from consideration, the result would be the same. Affirmed.[15]

PEOPLE v. PHŒNIX BANK.

(Supreme Court of New York, 1840. 24 Wend. 431, 35 Am. Dec. 634.)

Information in the nature of a quo warranto against the defendants for claiming to be and acting as a corporation. The information was filed March 25, 1838. The defendants pleaded the several acts of the legislature by which they were created and continued a corporation. They were originally incorporated by the name of the New York Manufacturing Company. Statutes of 1812, p. 509. The affairs of the company were to be managed by fifteen directors, of whom the stockholders were to choose all but one, who was to be appointed annually by the council of appointment, in behalf of the state, and was to hold his office for one year, and until another should be appointed in his stead. Sections 3, 5. The corporation subsequently took its present name, Statutes of 1817, p. 30, § 4; and in 1831, the charter was extended until 1854, and the company was subjected to various provisions of the revised statutes, and to the safety fund law. Statutes of 1831, p. 28.

The attorney general put in sixty-two replications, each of which alleged that the defendants had taken usury on making a loan or discount in the course of their business as bankers. The acts were alleged to have been done in the years 1836 and 1837.

On the 19th March, 1840, the defendants rejoined, that on the tenth day of that month, William B. Townsend was by the governor and senate nominated and appointed a director of the company in the place of James Campbell, whose term of office had expired; that he was commissioned, and had entered on the duties of his office. Verifica-

[15] See State ex rel. v. Janesville Water Co., 92 Wis. 496, 66 N. W. 512, 32 L. R. A. 391 (1896); People ex rel. v. Improvement Co., 103 Ill. 491 (1882).

Compare State ex rel. v. Southern B. & L. Ass'n, 132 Ala. 50, 31 South. 375 (1902); People v. Dashaway Ass'n, 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117 (1890); Attorney General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227 (1870).

tion, &c. The attorney general demurred, and the defendants joined in the demurrer.

BRONSON, J. No question has been made upon the sufficiency of the replications. The case, then, comes to this, the attorney general alleges that the defendants have forfeited their corporate privileges by taking usury. The defendants answer, that a state director has since been appointed by the governor and senate; and this act, they insist, amounts to a waiver or pardon of the forfeiture. The conclusion does not follow from the premises.

No one could take advantage of the forfeiture in a collateral manner. It could only be asserted by a direct legal proceeding on the part of the government to dissolve the corporation. Notwithstanding the existing cause of forfeiture, the defendants were a corporation de facto, and might continue to exercise their franchise until judgment of ouster should be pronounced against them. In the meantime, it was the duty of the governor and senate, as well as all others, to treat the defendants as a legally existing corporation. The appointment of a state director was, therefore, perfectly consistent with the intention to continue this prosecution, and insist on the forfeiture.

Should it be conceded that the governor and senate had a dispensing power it does not appear that the power has been exercised. We are not authorized to follow the suggestion of the defendants' counsel, and assume that the appointment was made for the purpose of waiving the forfeiture. There is no such allegation in the rejoinder; and besides, we cannot shut our eyes to the fact that there was another and a sufficient ground for the exercise of the appointing power. Indeed, if the public officers believed that the defendants had violated their charter, they had a cogent reason for making the appointment, to the end that there might be one director in the board to watch over the public interests until the forfeiture could be asserted, and the corporation dissolved in the forms prescribed by law.

Enough has been said to dispose of this case. But I must not be understood as admitting that the governor and senate, without the concurrence also of the assembly, had any dispensing power. They had no more authority to waive or pardon the forfeiture than any other public officer or body of men. Indeed, the attorney general had more power over this matter than the governor and senate united; for if he refused to prosecute, the wrong charged upon the defendants would go unpunished, and the corporation would continue to exist and enjoy its privileges in the same manner as though there had been no violation of the charter. Still, the neglect to prosecute would not amount to a pardon; it could only operate as a waiver so long as the omission continued, and would be no answer to a quo warranto whenever he, or his successor in office, might choose to insist on the penalty.

In England, where corporations may be created by royal charter, the king can pardon a forfeiture, by granting restitution; but he has, I think, no such power in relation to corporations created by act of parliament. The King v. Amery, 2 T. R. 568, 9; Newling v. Francis, 3 T. R. 189; The King v. Miller, 6 T. R. 277. So here, where corporations are created by the legislature, that body can waive the forfeiture, by ratifying and confirming the original grant. The People v. Manhattan Company, 9 Wend. 351. But no other body of men has any such dispensing power. The franchise is granted upon condition that it shall become void in case of misuser; and although the corporation will continue to exist until the forfeiture is asserted in the forms prescribed by law, the condition can only be changed, or the penalty released, by the power which made the original grant. The legislature may, perhaps, delegate its authority to pardon the offence; but that has not been done.

The rejoinder does not show that any act has been done which is inconsistent with the assertion of the forfeiture; and if it were otherwise, the governor and senate, without the concurrence of the assembly, had no dispensing power.

Judgment for the people.

SECTION 3.—EFFECT OF DISSOLUTION

THORNTON v. MARGINAL FREIGHT RY. CO. et al.

(Supreme Judicial Court of Massachusetts, 1877. 123 Mass. 32.)

Bill in equity, filed February 2, 1877, against the Marginal Freight Railway Company and the Union Freight Railroad Company, alleging that the plaintiff, at July term, 1875, of the superior court for the county of Suffolk, recovered judgment against the Marginal Freight Railway Company, for money due from it to him before May 6, 1872, upon which judgment execution was duly issued, and remained unsatisfied; that the charter of the Marginal Freight Railway Company was repealed or attempted to be repealed, by St. 1872, c. 342, passed May 6, 1872, at which time it owned certain railroad tracks in the streets of Boston; that the Union Freight Railroad Company was incorporated by the same statute, and by virtue thereof took these tracks; that the Marginal Freight Railway Company, being dissatisfied with the estimate duly made of its damages by reason of such taking, filed a petition to the superior court for a jury to estimate such damages, which application was still pending; that the interest of the Marginal Freight Railway Company in its claim for damages could not be come at to be attached or taken on execution

in an action at law against it; and that the Marginal Freight Railway Company neglected to press its application for a jury.

The prayer of the bill was that the Marginal Freight Railway Company might be ordered to prosecute, or to permit the plaintiff to prosecute, that petition to final judgment; that the Union Freight Railroad Company might be ordered to pay to the plaintiff so much of such judgment as might be recovered against it as might be necessary to satisfy the plaintiff's debt; that the defendants might be restrained from discontinuing or settling the action without first paying to the plaintiff the amount of his debt; and for further relief.

The Union Freight Railroad Company demurred, on the ground that the plaintiff's judgment against the Marginal Freight Railway Company was void, and that the bill could not be maintained against either defendant, because the charter of that corporation was repealed more than three years before the recovery of the judgment or the bringing of the bill; and for want of equity.

The Marginal Freight Railway Company filed an answer, containing a demurrer for want of equity.

Hearing before Endicott, J., who reserved the case, on the bill and demurrers, for the consideration of the full court.

GRAY, C. J. The bill is framed upon the theory that the plaintiff has recovered a valid judgment against the Marginal Freight Railway Company; that that company has a claim for damages for the taking of its tracks by the Union Freight Railroad Company; and that the interest of the former company in this claim cannot be come at to be attached or taken on execution in a suit at law against it, and should therefore be applied in equity to the payment of the plaintiff's judgment debt. The difficulties in the way of maintaining this bill appear to us to be insuperable.

St. 1867, c. 170, by which the Marginal Freight Railway Company was incorporated, was subject to repeal at the pleasure of the legislature, by virtue of the power expressly reserved by Gen. St. c. 68, § 41, which was a part of the contract made between the commonwealth and the corporation by its charter. That charter was expressly and legally repealed by St. 1872, c. 342, which incorporated the Union Freight Railroad Company, and authorized the latter corporation to take the tracks of the former, making compensation therefor in the manner provided by the laws relating to the taking of lands by railroad companies, Crease v. Babcock, 23 Pick. 334, 34 Am. Dec. 61; Pennsylvania College Cases, 13 Wall. 190, 20 L. Ed. 550; State v. Miller, 30 N. J. Law, 368, 86 Am. Dec. 188; s. c., 31 N. J. Law, 521; Metropolitan R. Co. v. Highland Ry. Co., 118 Mass. 290.

Upon the absolute repeal of a charter by the legislature acting within the limits of its constitutional authority, the corporation ceases to exist, and no judgment can afterwards be rendered against it in

an action at law. But such repeal does not impair the obligation of contracts made by the corporation with other parties during its existence, or prevent its creditors or stockholders from asserting their rights against its property in a court of chancery, in accordance with the reasonable regulations of the legislature, or with the general principles and practice in equity. Foster v. Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; Read v. Frankfort Bank, 23 Me. 318; Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649; Mumma v. Potomac Co., 8 Pet. 281, 8 L. Ed. 945; Curran v. Arkansas, 15 How. 304, 14 L. Ed. 705; Bacon v. Robertson, 18 How. 480, 15 L. Ed. 499; Lum v. Robertson, 6 Wall. 277, 18 L. Ed. 743.

Upon the repeal of the charter of the Marginal Freight Railway Company by St. 1872, c. 342, which was passed and took effect on May 6, 1872, the corporation was nevertheless, by virtue of Gen. St. c. 68, § 36, continued a body corporate for the term of three years afterwards, for the purpose of prosecuting and defending suits by or against it, and of enabling it gradually to settle and close its concerns, to dispose of and convey its property, and to divide its capital stock. And, under section 37 of the same chapter, this court, sitting in equity, on the application of a creditor or stockholder, at any time within the three years might have appointed receivers, whose powers should continue as long as the court should deem necessary, to take charge of the estate and effects of the corporation, to collect the debts and property due and belonging to it, to prosecute and defend suits, in its name or otherwise, and to do all other acts which might be done by the corporation, if in being, necessary for the final settlement of its unfinished business.

No application having been made for the appointment of a receiver, the Marginal Freight Railway Company, at the expiration of the three years, ceased to have any such existence that a valid judgment could be rendered against it in an action at law. We cannot regard the provision of St. 1876, c. 229, § 3, that "nothing in this act contained shall be construed as affecting the legal rights of" that corporation (which is not otherwise mentioned in the act), as a legislative recognition that it had, at the time of the passage of this statute, any rights or any existence. The judgment recovered by the plaintiff against the Marginal Freight Railway Company in July, 1875, was therefore wholly void, as if it had been rendered against a dead person.

This bill cannot be maintained under that clause of Gen. St. c. 113, § 2, which confers upon this court jurisdiction of "bills by creditors to reach and apply, in payment of a debt, any property, right, title, or interest, legal or equitable, of a debtor, within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor:" because that clause extends only to living debtors and existing corporations. And a court of equity has no general jurisdiction of a bill by a single creditor, who has not recovered

a valid judgment against his debtor, and whose debtor has ceased to exist, to apply to the payment of his debt property of the debtor in the hands of a third party.

Although one passage near the end of the opinion in Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747, taken by itself, might seem to be inconsistent with this view, it is to be observed that that case, as well as the earlier one of Taylor v. Columbian Ins. Co., 14 Allen, 353, was submitted to the court upon an agreed statement of facts, waiving all questions of form, and was decided upon the ground that the corporation did not appear to have been dissolved.

The reasons above stated being conclusive against the right to maintain this bill, the demurrer of the Union Freight Railroad Company must be sustained, and the bill dismissed.[16]

PEOPLE v. GLOBE MUT. LIFE INS. CO.

(Court of Appeals of New York, 1883. 91 N. Y. 174.)

FINCH, J.[17] There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears it would have done so if let alone. But it was not permitted to perform. The State, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part. Shaw v. Republic Life Ins. Co., 69 N. Y. 292, 293; James v. Burchell, 82 N. Y. 113. He could do neither. Performance by him had become illegal. It would have been a criminal contempt, and possibly a misdemeanor. There could be neither readiness nor ability to do the forbidden and unlawful acts. Jones v. Knowles, 30 Me. 402. So that from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after.

[16] See Venable Bros. v. Southern Granite Co., 135 Ga. 508, 69 S. E. 822, 32 L. R. A. (N. S.) 446 (1910); Bacon v. Robertson, 18 How. 480, 15 L. Ed. 499 (1855).

[17] Facts sufficiently stated in the opinion, part of which is omitted.

What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the State, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation. People v. Security Life Ins. Co., 78 N. Y. 115, 34 Am. Rep. 522. Then too the subject-matter of the contract was that of skilled personal services to be rendered by one and received by the other. It was inherent in the bargain that a substituted service would not answer. The company were not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. The contract in its own nature was dependent upon the continued life of both parties. With the natural death of one, or the corporate death of the other, the contract must inevitably end. So that, in its own inherent nature, by the unexpressed conditions subject to which it was made, and by the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed.

It is easy to see how the situation of Mix differs from that of the policy-holders. We held in the Security case that the latter were creditors and stood upon a breach of their contract; but that breach was not the dissolution of the company. It antedated such dissolution and was the prior cause, of which the latter was the consequence. The reserve required by law was essential to the safety of the policy-holders. A covenant to maintain it was implied in every contract of insurance. That covenant the company broke by its own neglect, for which it alone was assumed to be responsible. The State found these contracts broken, and for that reason interfered, and when its decree of dissolution came it had to deal with broken contracts and treated them as it found them. The same distinction explains the English cases which were commended to our careful attention. Yelland's Case, L. R., 4 Eq. 350; Clarke's Case, L. R., 7 Eq. 550; Logan's Case, L. R., 9 Eq. 149; Maclure's Case, L. R., 5 Ch. App. 737; Dean's Case, L. J., 41 Ch. (N. S.) 476. In all of them the companies stopped payment before any intervention of the law, and this being done by open and public notice, amounted to a voluntary refusal of performance, and therefore a breach of contract, established before the winding up orders were made and the liquidators appointed. When the court interfered it found broken contracts and a liability for a breach already existing, and dealt with what it found. It did not itself break what was already broken.

Still another class of cases is obviously different. People v. National Trust Co., 82 N. Y. 283. They are such as affect property rights and survive the death of the parties. Performance can be made by assignees or successors, and nothing in the essence of the agreement depends upon the life of the parties, or forbids its complete execution by others. And in all of the cases thus cited there was no incapacity affecting both parties alike. The one suing for a breach was free, so far as he was concerned, to offer performance, and had the necessary ability. He could thus put his adversary in the wrong, while here the same blow, at the same instant, stopped performance on both sides and made it illegal on the part of either.

But exactly at this point the learned counsel for the appellant interposes a proposition which presents a difficulty. Practically conceding most that we have said, he insists that the contract is only dissolved when its destruction comes from an outside and independent force, operating separately, and not occasioned directly or indirectly by the act or omission of the party pleading it as an excuse. In other words such party must be innocent and blameless in respect to the vis major which dissolves the contract, and if not so, cannot plead as an excuse what practically is his own fault and act. And our attention is directed to this feature as characterizing the cases in which the agreements were held to have been ended. They are grouped in the appellant's points and need not be repeated. He has stated their purport correctly. In all of them both parties were innocent of and blameless for the outside and independent agency which dissolved the contract. And the argument is now pressed that in the present case the company was not only not blameless for its dissolution, but that resulted from its own acts or omissions, was directly caused by them, and, therefore, such dissolution must be deemed its own act, which it cannot plead as an excuse. This leads to the inquiry whether the company was so the responsible cause of the action of the State as to make the dissolution its own act.

The answer is that no such fact is shown, nor is it a necessary inference from the facts which do appear. The judgment of dissolution is not here. We only know from the stipulation of the parties that the company was organized under chapter 902 of the Laws of 1869, and that the superintendent of insurance made the certificate provided for in section 7 of said act, and the attorney-general thereupon commenced the action for dissolution. The superintendent probably acted because the company's reserve had fallen below the lawful and safe level. Perhaps we ought to presume as much as that, but if so, the result may have happened from causes beyond the company's control and without its fault. It was its duty to invest the reserve and keep it interest-bearing. It may have done so with entire prudence at the time, and in strict accordance with the law, and then all values have so shrunk and dwindled from commercial causes as to have impaired the reserve. In such case the dissolution would have come

from outside and foreign forces, operating independently and both beyond control. If it be said the company was still the indirect cause of the dissolution since it made the investments and failed to repair and strengthen them to the legal limit, the answer may be that it could not do it.

The rule must not be pushed to an extreme. Thus, in the case of the sailor having a running contract for service with the ship-owner, and sent home by a naval court as a witness against the captain for shooting one of the crew, and unable to return to the ship after the trial, and whose contract was held to be dissolved (Melville v. De-Wolfe, 4 E. & B. 844), similar suggestions might have been made. It could have been said that it was his duty to return to the ship, but that such return had become impossible, without his fault, or that of the ship-owner, was held sufficient. Then too, it could have been argued that if the sailor had not been present at and seen the murder, which was his voluntary act, and which he might have avoided, the law would not have sent him home.

Of course nobody thought of pushing the rule to such an extreme; nor must it be done here. The sailor was not bound to foresee that his innocent and blameless presence at the scene of the murder would involve a dissolution of his contract through the intervention of the law; nor the company that its investments, honestly and prudently made, would shrink beyond repair, and bring down a dissolution by the State. If, in such case, in some sense, such dissolution may be deemed the act of the company, in a similar sense, and through the same mode of reasoning, we might, in a case of master and servant, trace the death of the former to his own negligence in eating or drinking, or exposure to heat and cold, and so determine his non-performance to be inexcusable, and to draw after it damages for a breach. As it is thus evident that a man may be, in some sense, the occasion, or even the indirect cause of his own death, and in the same sense blamable for it, without its being, in a legal sense, and considered as a vis major, his own act; so a corporation may be said, through the conduct of its officers, to have, in some sort, occasioned its own corporate death, while yet it would remain true that its dissolution by the independent force of the State would be not its own act; not at all the product of its own volition; and not a breach by it of its contracts previously unbroken. Especially is this true as between the company and its own officers contracting with it. One of these may be innocent himself of any wrongful act or neglect, and yet it is inherent in the nature of his contract that he takes the risk of such act, or neglect, on the part of the other officers, as may tend, under the law, to produce a dissolution, if such dissolution in fact occurs. That possibility entered into his contract, when made, and belonged to it as an inevitable condition, for its complete performance depended upon the corporate life, and that under the law upon the fulfillment of the law's conditions.

In the event of such corporate death the motive of the State, or the ground of its act is wholly immaterial. Its risk was upon the contractor, whatever its cause or occasion; and however it may have been provoked or induced, it must be deemed the act of the State, and not of the corporate body. And it is the independent act of the State, for although the reserve may have fallen below the prescribed level, a dissolution is not the necessary consequence. That may follow, or may not follow. The superintendent of insurance may make the certificate which sets the law in motion, or may withhold it. The matter lies within his sole discretion and control. He may act or not, as he chooses, but if he does it is his act, and not the company's; dependent wholly on his volition and not on that of the corporation, an independent agency guided by its own motives, and not the act of the company producing its own death. * * *

Other considerations of very serious import were adverted to by the courts below, which we need not here discuss. What has been said sufficiently indicates our opinion that no error was committed in rejecting the claim of the general agent.

The order should be affirmed. All concur.

Order affirmed.[18]

FOX v. HORAH.

(Supreme Court of North Carolina, 1841. 36 N. C. 358, 36 Am. Dec. 48.)

This was a bill filed in Mecklenburg Court of Equity. The plaintiff had obtained an injunction from a Judge out of court, and at Fall Term, 1840, of the said court, a motion was made by the defendant to dissolve the injunction, and his Honor Judge Settle, upon hearing the motion, ordered the injunction to be dissolved with costs. From this decree the plaintiff, by leave, appealed to the Supreme Court. The facts of the case are stated in the opinion delivered in this court.

GASTON, J. A loan of money was obtained by one John G. Hoskins from the late State Bank of North Carolina, by the discount at the Salisbury Branch of said bank, of a note executed by said Hoskins as principal and Stephen Fox and William W. Long as sureties; payable at said branch to William H. Horah, cashier thereof. Upon this note an action at law was brought by Horah in the County Court of Mecklenburg against Hoskins, Fox and Long, which action was by successive appeals of the defendants carried up to the Superior Court of that county, and thence to this court, and a judgment was ultimately obtained by the plaintiff, after a deduction of sundry payments, for a

[18] Compare Tiffin Glass Co. v. Stoehr, 54 Ohio St. 157, 43 N. E. 279 (1896); Schleider v. Dielman, 44 La. Ann. 462, 10 South. 934 (1892); Griffith v. Boom & Lumber Co., 46 W. Va. 56, 33 S. E. 125 (1899); Rosenbaum v. United States Credit System Co., 61 N. J. Law, 543, 40 Atl. 591 (1898).

balance of $468, 19 cents with interest on $385, 62 cents, part thereof, from the February Term, 1839, of Mecklenburg Superior Court. Pending this action in the Superior Court the charter of the bank expired by its original limitation, and an attempt was there made to set up this occurrence as a legal defence; but the defence failed, because, in the language of this court, "the legal interest in the debt was in Horah, and the action properly brought by him, and whether he was a trustee for the bank or any other person was an enquiry with which a Court of Law had no concern." Horah v. Long, 20 N. C. 416, 34 Am. Dec. 278.

Therefore Fox, the present plaintiff, filed this bill against Horah, in which, after setting forth the death and insolvency of Hoskins and also the insolvency of Long, and charging certain payments or equitable payments to have been made to the bank and its attorneys in full discharge of the debt, he insisted that the debt for which Horah had obtained a judgment, was due to the bank, that its charter had expired, that thereby the said debt, if any part thereof remained unpaid, was extinguished; that Horah was not entitled beneficially to the same or any part thereof; and that it is unconscientious in him to collect it for his own benefit, and praying for an injunction. Upon the filing of the bill an injunction was granted pursuant to the prayer. The defendant put in an answer, wherein he denied the payments alleged to have been made, and admitted the expiration of the charter as charged, and insisted that he, being the legal owner of the judgment, had a right, notwithstanding such expiration of the charter to collect the same, and declared his purpose, when it should be collected, to apply the proceeds to the satisfaction of outstanding demands against the late corporation and the stockholders thereof. Upon the coming in of this answer the defendant moved for a dissolution of the injunction with costs. The court so decreed, and from this decree the plaintiff prayed and obtained an appeal to this court.

One at least of the questions arising upon this appeal is not free from difficulty, and, so far as we can learn, is now for the first time presented for judicial decision. Certain it is that neither our own researches nor those of the counsel have furnished any adjudications, which have a direct bearing upon it. To enable us, therefore, to come to a just conclusion, we must go back to principles in some degree elementary to endeavor to ascertain them with precision, and apply them, when ascertained, to the case before us.

The late State Bank was formed by an association of individuals, under authority of Acts of the Legislature, by which they were constituted a body corporate and politic to continue until the first day of January, 1835. Though the several Acts, by which the institution was created or its powers, duties and duration declared were public acts, the corporation itself was a private corporation. State Bank v. Clark, 8 N. C. 36. As such it was an artificial person existing only in contemplation of law, and having those capacities, which its charter con-

ferred upon it, either expressly or as incidental to its existence. Among these was the capacity to hold property of the description mentioned in its charter, as an individual, continuing its existence and preserving its identity, notwithstanding all the changes by death or otherwise, among the natural persons, of whom that body politic was formed. This capacity—and others by which a corporation is enabled to maintain its personality and identity—are sometimes spoken of as constituting a kind of "legal immortality." It is certain, however, that the capacity to enjoy property in succession exists only so long as the corporation exists—that if by its charter the duration of the corporation be limited, and if that duration be not extended by the sovereign authority, the corporation dies when the allotted term of its existence has run out—and that, before the expiration of this term, the corporation may lose its existence by forfeiture of charter, because of ascertained delinquency, or by a dissolution of the connection, by which its members had been compacted into one artificial person.

We believe that the rules of the common law, governing the disposition of the property which the corporation held, at the moment of death are well settled—though differing according to the character of the property upon which they operate as being either realty, personalty, or choses in action. The real estate remaining unsold reverts to the grantor and his heirs, "because (in the language of Lord Coke) in the case of a body politic or incorporate the fee is vested in their political or incorporate capacity, created by the policy of man, and therefore the law doth annex a condition in law to every such gift and grant that if such body politic or incorporate be dissolved, the donor or grantor shall re-enter, for that the cause of the gift or grant faileth." Co. Lit. 136. Goods and chattels, by the common law, were deemed of too transitory and fluctuating a nature to be susceptible of reversionary interests after an estate for life, and, on the death of a corporation, they do not revert to the grantor or donor, but, being bona vacantia or goods wanting an owner, they vest in the sovereign, as well to preserve the peace of the public, as in trust to be employed for the safety and ornament of the commonwealth.

Choses in action are under the operation of a different rule. They were rights of the corporation to demand money in the hands of persons, by whom it was withheld. They derived their existence from contracts or quasi contracts—by which the relation of debtor and creditor was created. When the creditor corporation died—and there was no successor, no representative—the relation of debtor and creditor ceased, and the debt became necessarily extinct. None but the creditor had a right to demand the money, and when his right is gone, the money becomes to all purposes the money of the possessor. These rules of the common law, except so far as they have been modified by the Acts of our Legislature, and excepting also those cases, in which

by the charters of incorporation, special provision is made in regard to the corporate property, are the law here.

Very important alterations, however, have been made by our Legislature, but it is manifest that these have no application to the case, where a corporation expires by having lived out his allotted term. The Act of 1831, chapter 24 of the Revised Code, re-enacted in the Revised Statutes, chapter 26, directs how an information may be filed against a corporation existing de facto, in order to procure a judicial decision that it has forfeited its charter, or has been dissolved by the surrender of its franchises or by any other mode, and declares that on a final judgment rendered against the corporation of forfeiture or dissolution, the consequence shall not be to extinguish the debts due to or from the corporation, but that the court rendering such judgment shall appoint a receiver, and the receiver so appointed shall have full power to collect in his name all debts due to the corporation, to take possession of all its property, and to sell, dispose of and distribute the same in order to pay off the creditors of the corporation, and afterwards to reimburse the stockholders, under such rules, regulations and restrictions as the court rendering such final judgment shall direct. These provisions in every part of them contemplate cases, where the termination of the legal existence of the corporation is the consequence of a judicial sentence against it. Where a corporation has lived out the term prescribed by its charter, it is de facto defunct. No judicial sentence can be rendered against it.

There were, besides, peculiar reasons, demanding this special interposition of the Legislature in cases of what might be termed premature death of the corporation. So distressing are the consequences which, according to the common law rule resulted from a judicial death or dissolution, where the corporation was one that had carried on extensive operations, that the most flagrant violations of charter, the most culpable neglects to make the necessary election of officers, delinquencies of every kind and degree might be committed, and the public authorities would not dare to bring the questions of forfeiture or legal dissolution forward for judicial determination. But these provisions, by removing such distressing consequences, give freedom of action to the agents of the community, while they remove from the managers of corporate institutions the sense of impunity that might render them regardless of law. But the consequences of a regular death by the mere efflux of time could be anticipated by all—provided against by all; and legislative interposition against them was unnecessary.[19] * * *

It is the opinion of this court that there is error in the interlocutory decree appealed from, and that upon the defendant's answer the injunction theretofore granted ought not to have been dissolved.

[19] The consideration of the second point is omitted. The court held that it was against conscience in the defendant to collect the debt.

This opinion will be certified to the court below, and the defendant must pay the costs of the appeal.

PER CURIAM. Ordered accordingly.[20]

HEATH v. BARMORE.

(Court of Appeals of New York, 1872. 50 N. Y. 302.)

Action of trespass against the defendant for entering on lands formerly conveyed by plaintiff's grantor to the Fredonia & Sinclairsville Plankroad Company, but which the plaintiff claims have reverted in consequence of the abandonment of that company.[21]

RAPALLO, J.[22] In so far as the plaintiff's right to recover in this action is sought to be sustained, on the ground that at common law real estate held by a corporation at the time of its dissolution reverts to the grantor, it cannot be supported for two reasons: First, because the plankroad company has not been dissolved, and secondly, because the rule of law invoked by the plaintiff does not prevail in this State in respect to stock corporations. Under the provisions of 1 R. L. 248, and 1 R. S. 600, §§ 9 and 10, upon the dissolution of a corporation, the directors or managers at that time become trustees of its property (unless some other custodian is appointed), for the purpose of paying the debts of the corporation and dividing its property among its stockholders; and these provisions apply as well to the real as to the personal property of corporations. Owen v. Smith, 31 Barb. 641; 2 Kent Com. 307, 308; notes 371 and 372 of 11th Ed.; Ang. & Ames Corp., § 799, a (5th Ed.); Towar v. Hale, 46 Barb. 365. Consequently, where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor.

The conveyances to the plankroad company in this case appear to have been absolute conveyances—no condition or limitation of the estate seems to have been contained in them, and they therefore passed the whole estate of the grantor. 2 R. S. 748, § 1.

The plaintiff contends however that these conveyances having been made to a plankroad company, the estate granted must be deemed to be limited to that required for the purposes of a plankroad, and the devotion of them to those purposes is an implied condition or qualification of the grant, and in support of this position he cites Jackson v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263; Matter of John and Cherry Streets, 19 Wend. 659, 675; Hooker v. Utica Turnpike Co., 12 Wend. 371; Mahon v. N. Y. Cent. R. Co., 24 N. Y. 658; Trustee,

[20] The principal case was expressly overruled in Wilson v. Leary, 120 N. C. 90, 26 S. E. 630, 38 L. R. A. 240, 58 Am. St. Rep. 778 (1897).

[21] Statement of facts substituted.

[22] A part of the opinion is omitted.

etc., v. Auburn & Roch. R. Co., 3 Hill, 568; Fletcher v. Auburn & Syracuse R. Co., 25 Wend. 462; Bloodgood v. Mohawk & Hudson R. Co., 18 Wend. 9, 31 Am. Dec. 313.

It did not appear in either of the cases cited that there had been any conveyance by the owner of the soil to the corporation. They are all cases of lands taken for streets or highways or by turnpike companies who were authorized to take lands necessary for the construction and operation of their roads, at an appraised value; and they hold that as to lands taken for highways, the public acquires only an easement, leaving the fee in the original owner, and that as to lands taken by turnpike companies, although the acts declare that they shall be held by the company, its successors and assigns forever, it acquires only such interest as is necessary for the public use for which the lands are taken; that when that use ceases, the lands revert, and that an additional burden, such as a steam railroad, cannot be imposed upon them by law, without making further compensation to the owner of the fee.

These cases decide only what was the legal effect of a taking of land in invitum for highways, or under the provisions of the Turnpike Act, but do not determine the effect of a voluntary conveyance by an individual to a corporation capable of taking land by purchase. Even a turnpike company may by grant acquire lands in fee and convey an indefeasible title to a purchaser. People v. Mauran, 5 Denio, 389. * * *

As to the land of which the plaintiff held the legal title at the time of his conveyance to the plankroad company, that conveyance passed all his estate and interest in the land. The price paid by the company must be deemed to be the consideration for the entire fee, and he consequently retained no property therein which would preclude the State, with the assent of the plankroad company, from devoting the land to other public uses, though they should impose greater burdens upon it than a plankroad, or even from declaring by law that a surrender of any part of the road by the company, in the form prescribed by the act, should operate to transfer the title of the company to the town. See Heyward v. Mayor, etc., 7 N. Y. 314. The words of the act of 1854 (Chap. 87, § 1), (a) which declare that the portion surrendered shall "cease to be the property of the company and revert and belong to the several towns," etc., are, we think, sufficient to make the surrender equivalent to an alienation by the company, and broad enough to embrace lands which never before belonged to the towns, as well as those which were, when acquired by the company, public highways. The act of 1854, under which the defendant justifies, cannot therefore be successfully assailed on the ground that it takes property of the plaintiff for public use without just compensation.

These views dispose of the case so far as the lands of which the plaintiff held the legal title, at the time of his conveyance to the company, are concerned. * * * All concur. Judgment affirmed.

In re HIGGINSON & DEAN.

Ex parte ATTORNEY-GENERAL.

(Queen's Bench Division. L. R. [1899] 1 Q. B. Div. 325.)

Appeal by the Attorney-General, on behalf of the Treasury, from the order of the judge of the county court at Liverpool, expunging the proof of the Royal Bank of Liverpool in the bankruptcy of the debtors, Messrs. Higginson & Dean. The bankruptcy took place in the year 1847, and the liabilities of the debtors amounted to nearly £900,000. The Royal Bank of Liverpool proved in the Bankruptcy for £566,000. and Messrs. Littledale, who were respondents to the present appeal, and other creditors, proved for smaller sums. It had recently been ascertained that the bankrupts had been entitled to certain shares in the Leeds & Thirsk Railway Company, the undertaking of which company had been acquired by the North Eastern Railway Company, so that the shares belonging to the bankrupts were exchangeable for shares in the North Eastern Railway Company. The official receiver, as ex officio trustee in the bankruptcy, had recovered for the estate a sum of £6500., the proceeds of these shares, and held that amount as trustee. In the year 1887 an order was made by North, J., under the Companies Acts, dissolving the Royal Bank of Liverpool. Messrs. Littledale, as creditors in the bankruptcy, moved before the county court judge to expunge the proof of the Royal Bank. The judge made an order expunging the proof, and the present appeal was from that order.

WRIGHT, J.[28] * * * Subject to one difficulty I think that the grounds of the learned county court judge's decision cannot be maintained, and that the Crown is entitled to succeed.

From the time of Lord Thurlow's decision in Middleton v. Spicer, 1 Bro. C. C. 201, in 1783, it has been an accepted proposition of law that chattels real or personal vested in a person as a mere trustee upon private trusts which have failed are as a general rule held by him as a trustee for the Crown of bona vacantia; and during all the period which has elapsed since that decision no exception from the rule seems to have been established. It has been illustrated by many cases which shew that the possession conferred on the trustee for purposes of jurisdiction or administration gives him no beneficial title, as by occupancy or otherwise, which he can conscientiously set up against the Crown. Such cases are: Barclay v. Russell, 3 Ves. 424, at page 430, per Lord Loughborough; Powell v. Merrett (1853) 1 Sm. & G. 381, Stuart, V. C.; Cradock v. Owen, (1854) 2 Sm. & G. 241, Stuart, V. C.; Read v. Stedman (1859) 26 Beav. 495, Romilly, M. R.; Cunnack v. Edwards, [1896] 2 Ch. 679 C. A. And in Dyke v. Walford, 5 Moo. P. C. 434, the right of the Crown as against the

[28] Part only of the opinion is given.

ordinary to bona vacantia in cases of intestacy is traced back to very early times.

Nor, I think, is there any authority for holding that the Crown is in any worse position in relation to chattels held in trust for a corporation which has become dissolved than in relation to chattels held in trust for a natural person deceased. The same principle seems applicable in both cases. The Courts will not allow a person who has obtained title or possession as a mere trustee of chattels to set up unconscientiously any beneficial title by occupancy, possession, or otherwise. The text-books, such as those of Kyd, Grant, and Lewin, agree, though in some cases with an "it seems," that the Crown is entitled to the personal estate of a dissolved corporation aggregate.

Nor is there any authority for holding that the creditors, other than the dissolved Bank, have any jus accrescendi, or of survivorship, entitling them to the share of the creditor who has become extinct without successor or representative. In Ashley v. Ashley, 4 Ch. D. 757, where, in a suit for administration, such a claim was made and failed, James L. J. asked why the Crown might not take out representation to the petitioners. 4 Ch. D. at page 763. Prima facie, therefore, as it seems to me, the Crown is entitled.

The difficulty is, that as it is argued, on the dissolution of the Bank, not only did its artificial personality come to an end, but the debt due to it from the bankrupts lapsed or was extinguished. The existence of a debt, it is said, imports the existence of two parties to the obligation, and the obligation of the debtors to the bank is not, upon the dissolution of the bank converted into an obligation of the debtors to the Crown. The Bank, therefore, has ceased to be a creditor, and the Crown has not become a creditor; the ground of the proof has gone as completely as if it had never existed, and the proof ought to be expunged, with the consequence that the official receiver is now a trustee of the fund for the remaining creditors, as if there never had been any others. Therefore, it is argued, there is no failure of cestuis que trustent, and no property which, for default of any cestui que trust to claim it, can be said to be held in trust for the Crown.

The authorities for the proposition that on the dissolution of a corporation aggregate debts due to or from it are extinguished are by no means clear or satisfactory. In 1 Bl. Com. p. 484, and in 2 Kyd on Corporations, p. 516, and in Grant on Corporations, p. 303, such a proposition is stated, but in terms which suggest that no more is meant than that, after the dissolution, the individuals who were members or officers of the corporation cannot sue or be sued in respect of its rights or obligations: and this is all that is established by the cases there cited. "The debts of a corporation" (Blackstone says), "either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover or be charged with them, in their natural capacities; agreeable to that maxim of the civil law, si quid universitati debetur, singulis non debetur; nec, quod debet uni-

versitas, singuli debent." The American decision in the case of State Bank v. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234, relies on those authorities as supporting the general proposition, but it does not advert to this qualification, or add new references to authority, and the authorities cited do not in any way support the proposition, except as so qualified. Grant on Corporations (published in 1850), p 303, is explicit in the same sense as the American case last cited, but does not refer to any authority which, so far as I can see, has any bearing on the matter.

Nor do the old authorities as to the effect of dissolution of municipal or other corporations add anything decisive of the question. In the 17th and 18th centuries corporations aggregate, constituted by charter or letters patent, were numerous, and questions frequently occurred as to the effect upon their rights and obligations of dissolution, revival, and reincorporation, with or without change of name or constitution. Many references to such cases will be found in Anderson's Reports and in Rex v. Pasmore (1789) 3 T. R. 199. I cannot find that in any case the rights or obligations of a corporation were held to be affected by a technical dissolution. Nor, on the other hand, can I find a case in which such a question has been decided, where the corporation had not been revived, or some provision made by statute or charter with reference to its obligations. In Mayor, etc., of Colchester v. Seaber (1766) 3 Burr. 1866, the revived corporation sued in its own name on a bond given to the dissolved corporation, and succeeded. Sir Fletcher Norton, for the plaintiff corporation, argued that the goods and chattels of the old corporation, including its choses in action such as the bond, had on its dissolution passed to the Crown, and that the Crown in granting a charter of revival had regranted them to the revived corporation. Mr. Dunning, on the other side, neither admitted nor denied this, and the Court is not reported to have expressed any opinion on this point, it being held that there was only a qualified dissolution, and no absolute break of continuity.

Suppose the bank at the time of its dissolution had been in credit at another bank, or held notes of another bank, or had issued notes of its own. Would the dissolution have destroyed the obligations in these cases? In the United States of America there have been two decisions of Story, J., which are against such a conclusion. In Wood v. Dummer (1824) 3 Mason, 308, Fed. Cas. No. 17,944, the charter of a bank had expired. Before dissolution the bank had distributed its capital amongst its stockholders, without providing for payment of outstanding notes. It was held that after the dissolution noteholders were entitled to make stockholders account to them, as for moneys impressed with a trust of which the stockholders had notice. In Mumma v. Potomac Co. (1834) 8 Pet. 281, 8 L. Ed. 945, it was contended that the dissolution of an insolvent incorporated company, under a statute of the Legislature of a State, was inoperative, as being contrary to the Constitution, which prohibited the impairing of obliga-

tions by the Legislatures of particular States. Story, J., however, held that the obligations were not impaired by the dissolution: "The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of bona fide purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws." 8 Pet. at page 286, 8 L. Ed. 945.

This statement of the law may not perhaps be entirely applicable to this country, but it requires consideration. It might be reasonable to enact that, in analogy to the immemorial law of executors and administrators, and the statute of 31 Edw. III, St. 1, c. 11, on the dissolution of a corporation aggregate all its rights, including its rights of action on executed contracts, such as those evidenced by bank notes or bonds, or on claims in debt, devolve upon the Crown, subject to payment of the corporation's own debts. It would, however, I think, in the present state of the authorities, be judicial legislation to declare the Crown entitled to maintain actions in such cases except where it can allege a trust. Such a declaration may have to be made, or advisedly refused, in the case of some of the rapidly-increasing number of companies which are being dissolved under the Companies Acts.

But in the present case it is not necessary to decide this question. Even if it be the law that a debt due to a corporation aggregate is extinguished by the dissolution of the corporation, I do not think that it follows that the Crown's claim fails in this case. The original assignees in the bankruptcy, and their successors in office, have from the time of the bankruptcy been entitled to the old railway shares in trust for such creditors as had been or might be admitted to proof. The bank immediately before its dissolution was not a mere creditor. It was a creditor whose claim was in proof. Its claim was no longer a mere right of action for a debt. It could no longer have maintained an action as for a debt. The debt had been, at any rate provisionally merged in an equitable execution (Twiss v. Massey [1737] 1 Atk. 67, per Lord Hardwicke; Cooke's Bankrupt Laws [4th Ed.] c. 1, p. 5); and the right to sue had been replaced, not, indeed, by any particular interest in any specific chattels, but by a right to have all the assets, as and when realized, applied pro rata for the bank's benefit with the other creditors. This right as it seems to me, existed as an equitable interest or chattel at the time of the dissolution, and upon the dissolution of the bank that chattel or interest was not annihilated, but continued to be existing personal property, which devolved upon the Crown as bona vacantia as completely as any other equitable interest.

Alternatively, the case may be stated in a different way, but with the same result. From the time of the bankruptcy a title to the shares has been vested in the bankrupts' assignees and their successors in trust down to 1887 for the bank and the other creditors. In 1887

the bank disappeared. The assignees thereupon did not cease to hold the title to the shares nor did they cease to hold it as trustees. Their title did not depend upon the continued existence of any particular debt or of any particular creditors, nor did it become extinct upon the extinction of particular creditors. It continued to be a title upon trust, and the Crown takes the place of the extinct cestui que trust. Suppose all the creditors had been corporations aggregate, and all had become dissolved, it seems clear that the assignees could not have taken the property as their own as against the Crown.

It does not seem necessary to examine minutely the provisions of the Bankruptcy Acts, in order to determine whether the money can be regarded as unclaimed dividends belonging to the statutory fund. If the proof is to stand good for the Crown's benefit, that is another way of saying that the moneys are not unclaimed dividends. If, on the other hand, the proof ought to be expunged, on the ground that the creditor and the creditor's claim are absolutely extinguished, then the case must be the same as if the proof had never been admitted, and the money ought to be divided amongst the other creditors. Unclaimed dividend seems to me to mean dividend which has been declared upon admitted and existing proofs, but which the persons entitled to it neglect to claim; it supposes the existence of some one who could claim and who omits to claim. Here the dividend belongs either to the Crown or to the other creditors, and it is claimed and therefore it is not unclaimed dividend.

For these reasons we think that the appeal must be allowed. The costs of all parties, here and below, will be allowed out of the fund.

Appeal allowed. Leave to appeal.

CHAPTER VIII

CREDITORS OF THE CORPORATION

SECTION 1.—RIGHTS AND REMEDIES AT LAW AND IN EQUITY AGAINST THE CORPORATION

OVERTON BRIDGE CO. v. MEANS et al.

(Supreme Court of Nebraska, 1892. 33 Neb. 857, 51 N. W. 240, 29 Am. St. Rep. 514.)

POST, J. The plaintiff, the Overton Bridge Company, is a corporation organized for the purpose of constructing and maintaining a toll-bridge over the Platte river near the village of Overton, in Dawson county. In the fall of 1886, it entered into a contract with the defendant Means, in pursuance of which the latter erected the bridge in controversy on the range line between the ranges 19 and 20. Soon after the completion of said bridge the proper authorities of Dawson and Phelps counties opened a road along said range line and over said bridge; and said bridge has been used by the public ever since as a highway. For the purpose of assisting in the building of said bridge, Overton precinct, in Dawson county, voted to issue the bonds of said precinct in the sum of $6,000. Said bonds were subsequently issued and delivered to the plaintiff company, and by it turned over to defendant Means in part payment of the amount due under his contract.

There being a further sum due on said contract, defendant brought suit in the district court of Dawson county, and on the 26th day of April, 1888, recovered judgment against the plaintiff company for $2,681 and costs. Afterwards an execution was issued and placed in the hands of the defendant Taylor, as sheriff of Dawson county, who levied upon the bridge in controversy as real estate to satisfy said execution, said company having no other property.

The plaintiff thereupon filed its petition in the district court of Dawson county, by which it seeks to have defendant perpetually enjoined from selling said bridge to satisfy the aforesaid judgment. On the final hearing the district court entered a decree enjoining the sale of the bridge on said execution, but ordered the defendant Taylor, as a special master, to sell said bridge, and all the rights of the plaintiff company to maintain the same, including its franchise, for the purpose of satisfying the judgment aforesaid. From that decree plaintiff has appealed to this court.

We have not been referred to any provision of statute which will authorize the seizure and sale of the bridge in controversy to satisfy an ordinary judgment at law, either upon execution or decree of a court of chancery. If the decree of the district court can be upheld, it must be therefore by an application of the principles of the common law. We have in our investigation of the question involved, found no case the doctrine of which sustains the contention of defendant. On the other hand, we believe the rule deducible from all the cases may be safely stated as follows:

The property of strictly private corporations,—such, for instance, as manufacturing, mining, and trading companies,—or perhaps those in which the public is indirectly interested,—as libraries, hospitals, and the like,—is liable to be taken on execution, precisely as the property of an individual debtor; but the property of corporations which are classed as public agencies,—such as railroad and bridge companies,—which is essential to the exercise of their corporate franchise, and the discharge of the duties they have assumed towards the general public, cannot, without statutory authority, be sold to satisfy a common-law judgment, either on execution or in pursuance of an order or decree of court. Gooch v. McGee, 83 N. C. 59, 35 Am. Rep. 558; Baxter v. Turnpike Co., 10 Lea (Tenn.) 488; Water Co. v. Hamilton, 81 Ky. 517; Palestine v. Barns, 50 Tex. 538; Gue v. Canal Co., 24 How. 257, 16 L. Ed. 635; Seymour v. Turnpike Co., 10 Ohio, 476; Foster v. Fowler, 60 Pa. 27. It is said by Morawetz in his work on Private Corporations, (section 1125): "If a corporation has received aid from the government for a public purpose, any property of the company, necessary to enable it to accomplish this purpose is impressed with a trust in favor of the public and cannot be seized and sold by the creditors of the company under execution. Property acquired by the company by purchase, if not necessary to enable it to perform its duties to the public, may be taken under an attachment or execution; but, after exhausting this class of property, the only remedy of a judgment creditor is to obtain the appointment of a receiver, and a sequestration of the company's earnings."

The privileges conferred by law upon corporations to construct railroads, canals, bridges, etc., are conferred with a view to the use and accommodation of the public; and to permit the property necessary for the accommodation of the public to be taken and sold by creditors would be to defeat the prime object of the statute which endows such companies with corporate existence. The bridge in this case was, on its completion, dedicated to the use of the public, as was intended from the first, and has continued to be, and is now, a part of the public highway of the state; and it is not the policy of the law to permit it to be diverted from such use.

The judgment is reversed, and the cause remanded to the dis-

trict court, with directions to enter a decree in accordance with the prayer of the petition.

Reversed and remanded. The other judges concur.[1]

LOUISVILLE, N. A. & C. RY. CO. v. BONEY.

(Supreme Court of Indiana, 1888. 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435.)

This proceeding was instituted by Mathias Boney against the Louisville, New Albany & Chicago Railway Company, the complaint being essentially in the nature of a creditor's bill. Putting aside much irrelevant matter set up in the pleadings, the material facts upon which the questions for decision depend are the following: * * *

In 1874, Boney made a contract with the Indianapolis, Delphi & Chicago Railroad Company to grade three miles of the company's right of way. In 1875, Boney gave notice pursuant to statute of his intention to hold a contractor's lien on the right of way graded by him. As a result of a suit in 1876 against the company, Boney obtained a personal judgment against the company and a foreclosure of his lien, and became a purchaser of the right of way covered by it at the foreclosure sale. Subsequently other parts of the company's right of way were levied on to satisfy the balance of the judgment, which levy has never been released or disposed of. After the lien was acquired the franchises and property of the company was sold in pursuance of a trust mortgage executed by the company, but which was junior to that of Boney. Boney was not made a party to this suit. As a result of the sale the Chicago & Indianapolis Air Line Company was organized, succeeding the rights of the original company. Later the Air Line Company was consolidated with the Louisville, New Albany & Chicago Railway Company.

After the consolidation, in a suit to which Boney and the Louisville Company were both parties, it was adjudged that the former took nothing by his purchase at the foreclosure sale pursuant to his lien. Thereupon this suit was instituted by Boney in order to establish his claim against the Louisville Company. The court decreed that the Louisville Company should pay to Boney the amount of his judgment and in default of payment the sheriff was ordered to sell the property and franchises of the company within the state of Indiana. Appeal.[2]

MITCHELL, J.[3] [After deciding that the liability of the Louisville Company is substituted for that of the original companies, the court proceeds:]

[1] Compare Plymouth Ry. Co. v. Colwell, 39 Pa. 337, 80 Am. Dec. 526 (1861); Chicago & N. W. Ry. Co. v. Ellson 113 Mich. 30, 71 N. W. 324 (1897); Fulkerson v. Taylor, 102 Va. 314, 46 S. E. 309 (1904).

[2] Statement of facts abridged.

[3] A part of the opinion is omitted.

The other feature of the case presents a question of much greater difficulty. According to the established rule of the common law, which controls the current of modern authority, the franchises of a corporation—mere incorporeal hereditaments—were not subject to seizure and sale upon execution, in the absence of express statutory provisions authorizing the sale and prescribing the method of transfer. It follows as a natural sequence that lands, easements, or things essential to the existence of the corporation and the execution of its corporate duty, and without which its franchise would be of no practical use, cannot be levied upon and sold on execution at law, so as to detach them from the franchise, and thus destroy its use. Railroad Co. v. State, 105 Ind. 37, 4 N. E. 316; Ammant v. President, etc., 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593; Baxter v. Turnpike Co., 10 Lea (Tenn.) 488, 4 Amer. & Eng. Corp. Cas. 134; Herm. Ex'ns, 361.

Thus it has been said, in effect, that the franchises and corporate rights of a company, and the means which are necessary to enable it to maintain its existence and subserve the objects and purposes of its creation, are incapable of being granted away or transferred by any act of the company, without express authority, or by any adverse process against it. Canal Co. v. Bonham, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315. Accordingly, where, upon an execution issued on a judgment recovered against a canal company, the marshal had seized and advertised for sale a toll-house and sundry canal-locks and other tangible property, an injunction was sustained; the court holding that, in the absence of a statute, neither the franchise of the company, nor any lands or works essential to the enjoyment of the franchise, and which could not be separated from it without destroying or impairing its value could be sold on execution. Gue v. Canal Co., 24 How. 257, 16 L. Ed. 635; Draw-Bridge Co. v. Shepherd, 21 How. 112, 16 L. Ed. 38.

In a recent case, in which it appeared that a contractor had recovered a judgment against a railroad company, under which the "right of way to the railroad, so far as the right of way has been obtained, and all appurtenances belonging to said railroad," were sold by the sheriff, and conveyed to the purchaser, the supreme court of the United States held the sale void, saying, in effect, that the company had no estate in its right of way capable of being sold on execution on a judgment at law, apart from its franchise to own and operate a railroad; that what the company acquired was merely an easement in the land to enable it to discharge its functions of making and maintaining a public highway, the fee of the soil remaining in the grantor. Moreover, the court said, in substance, that it would be clearly violative of the policy of the state under whose laws the railroad company had been organized to permit a private individual to seize and appropriate, by means of an execution sale, the right of way which had been acquired by the railroad company in pursuance of the purposes for which it was organized. Railroad Co. v. Doe, 114 U. S. 340,

5 Sup. Ct. 869, 29 L. Ed. 136; Freem. Ex'ns (2d Ed.) § 179. "It may be considered as settled that a corporation cannot lease or alien any franchise or any property necessary to perform its obligation and duties to the state without legislative authority." Black v. Railroad Co., 22 N. J. Eq. 130-399; Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950.

Although a corporation, in respect to its capital, may be private, it may have been created nevertheless to accomplish objects in which the public have a direct concern, and its authority to acquire and hold property may have been conferred upon it in order that these objects might be consummated. In such a case the corporation takes its franchise, together with such property as the statute enables it to acquire by the exercise of the power of eminent domain, as a trust from the state, and it can neither alien the one nor the other without special authority, nor can they be seized and sold by any adverse process against it, unless express provision to that end has been made by statute. Stewart's Appeal, 56 Pa. 413; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700. Accordingly it was held that a corporation organized for the purpose of introducing water into a town for the accommodation of the inhabitants was in a certain sense a corporation for public purposes, and that its buildings and appendages necessary for carrying on its operations were not subject to sale in the process of enforcing a mechanic's lien taken thereon. Foster v. Fowler, 60 Pa. 27. "For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration. And that remedy is consistent with corporate existence, whilst a power to alien, or liability to levy and sale on execution, would hang the existence of the corporation on the caprices of the managers, or on the mercy of its creditors." Railroad Co. v. Colwell, 39 Pa. 337, 80 Am. Dec. 526.

While it is true that "the franchise to be a corporation is not a subject of sale and transfer unless the law by some positive provision has made it so, and pointed out the modes in which such sale and transfer may be effected," and while the authorities abundantly justify the statement that property acquired and held by a corporation for the exclusive purpose of enabling it to accomplish the purposes of its creation cannot, without like authority, be either directly or indirectly alienated, it does not follow that the creditors of such a corporation are remediless. 1 Freem. Ex'ns, § 179. Railroad corporations may sell or mortgage personal property, and the better view of the subject seems to be that the corporation's right voluntarily to alienate property, and the creditor's power to subject it to the payment of corporate debts, stands upon the same footing. Coe v. Railroad Co., 10 Ohio St. 372, 75 Am. Dec. 518.

As has been said, there is a distinction between the road and structures immediately connected therewith and appliances afterwards ob-

tained for the purpose of operating the road. "The interest or right of way in the land required for the construction of the road, the timber and iron of the track, and the depots and structures for the supply of water, and the like, are said to be part of the realty, and the road is not regarded as so constructed and prepared for use until such things are affixed. But when the road is thus constructed and ready for use, locomotives, cars, and other articles and materials, some of which are consumed in the use," are requisite, and the conclusion is well supported that these, when not in actual use, are liable to seizure and sale for the payment of debts. Railroad Co. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336; Pierce v. Emery, 32 N. H. 484; Coe v. Railroad Co., supra.[4]

The seizure and sale of such property does not confer any right in the franchise of the corporation, or to any of the privileges of the corporation. It is analogous to the case in which it appeared that the copyright of a map had been acquired under the act of congress, and that copper-plate engravings of the author had been seized and sold on execution. It was held that the intangible right to strike off and sell copies of the map was not sold. Stephens v. Cady, 14 How. 528, 14 L. Ed. 528. In all of those cases in which the owner of an intangible right, such as letters patent and the like, might himself voluntarily assign it, although property of that description is not capable of being seized and sold, on account of its incorporeal nature, it may nevertheless be subjected to the payment of the owner's debt by a bill in equity. Ager v. Murray, 105 U. S. 126, 26 L. Ed. 942.

A court of equity may, by its decree, compel the owner to execute an assignment of letters patent, because he is himself possessed of the power to assign. But, in the absence of a statute authorizing it, a court of equity cannot compel a railroad corporation to transfer its franchise or such property as is essential to the exercise of its corporate obligations, because, in the absence of such authority, the corporation could not itself voluntarily alienate or assign its property of that description.

The plaintiff in the present case acquired a mere statutory lien upon so much of the road-bed as he had constructed. The statute provides that the lien may be foreclosed, but it makes no provision for the sale of the franchise, or of the road as an entirety, or of anything that would in effect destroy or impair the use of the franchise.

The statutes regulating the construction and operation of railroads within the state plainly contemplate that the power to condemn lands and construct and operate railroads shall be confined to railroad corporations. There is no provision by which an individual citizen may condemn land for railroad purposes, nor is it contemplated that lands condemned and used for such purposes may afterwards be sold out

[4] But see Chicago & N. W. Ry. Co. v. Forest County, 95 Wis. 80, 70 N. W. 77 (1897).

on execution or by order of the court, and become the property of an individual, so long as the corporation is not dissolved, and continues in the use of its franchises and property. The statute, unlike that which authorizes railroad companies to execute mortgages on their property and franchises, gives the contractor a lien, and nothing more.

As it appears in the present case that the debt remains unpaid, the lien affords the basis for the exercise by a court of chancery of its flexible jurisdiction, to coerce payment of the debt. The legislature doubtless deemed it the wiser course to leave the method of coercing payment in each case to the court, rather than to prescribe a method which might be suited to one case, and not to another. While the corporation is solvent, with property and officers and agents subject to the order and process of the court within the state, a court of chancery cannot be without expedients for coercing payment out of any money or property which the corporation itself might have applied to that purpose.

We know judicially that the Louisville, New Albany & Chicago Railroad Company has hundreds of miles of railroad in operation in the state of Indiana. There is no suggestion that the corporation is insolvent. It has, aside from its franchise and fixed property, perhaps many thousands of dollars worth of property within the state which is subject to seizure and sale. Besides, it has many financial officers and agents within the state, who receive daily thousands of dollars for the corporation. All these are subject to the order and process of the court. This is the extent to which the court can go until it appears that the corporation is insolvent, and unable to pay its debts or meet its current obligations and liabilities; unable, in fact, longer to discharge the duties resting upon it as a corporation. In such a case, doubtless, a court of chancery would have the power to take possession of the corporate property by means of a receiver, and wind up the corporation, and sell its property. Upon that subject we decide nothing until a case arises.

The conclusion of the whole matter in the present case is that the order of the circuit court directing the railroad to be sold as an entirety, together with all its franchises, privileges, and immunities incident thereto, was in excess of the power of the court. So far as cases relied on seem to support a contrary doctrine from that above enunciated they are not deemed applicable to the facts in the present case. Railroad Co. v. Lewton, 20 Ohio St. 401; Railroad Co. v. James, 6 Wall. 750, 18 L. Ed. 854.

The justice of the case requires that to the extent that the decree of the court orders the sale of the railroad of the Louisville, New Albany & Chicago Railroad Company, as in the decree specified, including its franchises, privileges, and immunities connected therewith, it should be modified and reversed, with the costs of this appeal. So far as the decree orders and adjudges that the above-named railroad company

pay the plaintiff the sum therein named, it is affirmed, with leave to take such further steps, not inconsistent with this opinion, as may be deemed necessary to coerce payment of the judgment.

COVINGTON DRAWBRIDGE CO. et al. v. SHEPHERD et al.

(Supreme Court of the United States, 1858. 21 How. 112, 16 L. Ed. 38.)

CATRON, J. In December, 1854, Shepherd and others recovered a judgment against the Covington Drawbridge Company, for upwards of six thousand dollars. At the same time, Davidson recovered a judgment against the same company for upwards of a thousand dollars.

The corporation was created by an act of the Legislature of Indiana, and built a drawbridge over the Wabash river, in that State, pursuant to its charter; was sued for a tort in the Circuit Court of the United States for Indiana district, where the recoveries were had. Executions at law were regularly issued, and at March term, 1855, of that court, were returned by the marshal, "nothing found." Alias writs of fi. fa. were taken out and levied on the bridge as real estate, and in November, 1855, the marshal proceeded to sell the rents and profits of the same on Davidson's judgment for the term of one year, at the sum of $4,666.62, Davidson, the execution creditor, becoming the purchaser. The agent of Shepherd and others instructed the marshal not to sell the bridge on their judgment, and he returned the special facts. Davidson demanded possession of the bridge from the corporation, so that he might obtain the tolls, but the keeper of the bridge, and a principal owner of the stock, refused to surrender possession. In May, 1856, Shepherd, and those interested in the large judgment jointly with Davidson filed their bill in equity in the Circuit Court of the United States for the district of Indiana against the bridge company and Richard M. Nebeker as keeper, agent, and manager, of the bridge; praying that the court should appoint a suitable receiver to take possession of the same, and receive the tolls and income, and apply them to discharge the judgments at law, after defraying expenses. The court made the decree prayed for, from which the bridge company appealed to this court.

The first objection made to the decree is, that it does not appear by the bill that the defendant is properly described as incorporated by the State of Indiana. The bill alleges that "the Covington Drawbridge Company, of Covington, is a corporation and citizen of the State of Indiana;" and it is also insisted, that the judgments at law are void, because jurisdiction was not given to the United States courts by the averment of citizenship in either of the declarations. The judgment at law, in Shepherd's case, was brought before this court at the last term, when it was held that the averment of citizenship here ob-

jected to was sufficient. 20 How. 227, 15 L. Ed. 896. That decision is conclusive of the two foregoing exceptions.

The consideration whether by a creditor's bill corporate property and franchises can be subjected to pay the debts of the corporation, by taking possession and administering its affairs, and drawing to the court its revenues, is a question of great importance and some difficulty. In advance of this question, it is insisted here that there exists in Indiana an adequate remedy at law; that Davidson's judgment is satisfied by the levy and sale of the tolls of the bridge; and Davidson having obtained a remedy by fi. fa., Shepherd may do the same. To ascertain whether Davidson obtained satisfaction by the marshal's sale, we must inquire what property was sold, and what title to it acquired, that could be made available by possession and the receipts of tolls.

The Covington Drawbridge Company was duly incorporated to build a bridge across the Wabash river where it was navigable for steamboats, and not subject to be bridged by an individual assuming to exercise a mere private right. The corporation had conferred on it a public right of partially obstructing the river, which is a common highway, and which obstruction would have been a nuisance, if done without public authority. This special privilege, conferred on the corporation by the sovereign power, of obstructing the navigation, did not belong to the country generally by common right, and is therefore a franchise; and, secondly, the authority of taking tolls from those who crossed the river on the bridge was also a franchise, and freedom to do that which could not be lawfully done by one without public authority; this franchise could only be conferred by the Legislature directly, or indirectly through public agents and tribunals, in pursuance of a statute. The bridge is part of a road, and an easement, like the road; and the privilege of making the bridge, and taking tolls for the use of the same, is a franchise in which the public have an interest; the corporation, as owner of the franchise, is liable to answer in damages if it refuses to transport individuals on being paid or tendered the usual fare; the law secured the tolls as a recompense for the duty imposed to provide and maintain facilities for accommodating the public. Whether the timbers and materials of this bridge could be sold at auction by the marshal, by virtue of a fieri facias in his hands, as was held could be done by the laws of North Carolina in the case of the State v. Rives, 27 N. C. 297, we are not called on to decide in this case, as here the annual tolls were sold, and not the bridge itself.

By the laws of Indiana, lands and tenements cannot be sold under execution, until the rents and profits thereof for a term not exceeding seven years shall have been first offered for sale at public auction; and if that term, or a less one, will not satisfy the execution, then the debtor's interest or estate in the land may be sold, provided it brings two-thirds of its appraised value. The tolls, under the idea that they

were rents and profits of the bridge, were sold for one year, according to the forms of this law. The tolls of the bridge being a franchise, and sole right in the corporation, and the bridge a mere easement, the corporation not owning the fee in the land at either bank of the river, or under the water, it is difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. This is a question that this court may well leave to the tribunals of Indiana to decide on their own laws, should it become necessary. One thing, however, is plainly manifest, that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how they can obtain satisfaction of their judgments from this corporation, (owning no corporate property but this bridge,) unless equity can afford relief.

By the laws of Indiana, stocks in a corporation may be sold by virtue of an execution against the owner of the stocks, which the sheriff may transfer to the purchaser; but this law does not help these complainants; they did not proceed against the stocks; their judgment at law did not affect individual property, but corporate property. The question whether a railroad company's property, including the franchises, can be subjected to the debts of the corporation by a decree in equity, is treated very fully by Redfield on Railways, c. 32, § 2, p. 571; there the substance of the decisions affecting the doctrine is given in cases where there were liens by mortgage. The subject was well examined by the Supreme Court of Georgia in the case of the Macon & Western Railroad Company v. Parker, 9 Ga. 378. The contest there involved claims of creditors. When speaking of the necessity of equity exercising jurisdiction, the court say "that the whole history of equity jurisprudence does not present a case which made the interposition of its powers not only highly expedient, but so indispensably necessary in adjusting the rights of creditors to an insolvent estate as this did." The road was sold according to the decree; but, to settle the difficulty as to the sale of a franchise without the consent of the power granting it, upon application, an act was passed by the Legislature, creating the purchaser and his associates a body corporate, with the powers and privileges of the old company. In England, the practice is, to order a receiver to be appointed to manage the corporate property, take the proceeds of the franchises, and apply them to pay the creditors filing the bill. Blanchard v. Cawthorn, 4 Simons' R. 566; Tripp v. Chard Railway Company, 21 E. Law & E. R. 53.

All that we are called on to decide in this case is, that the court below had power to cause possession to be taken of the bridge; to appoint a receiver to collect tolls, and pay them into court, to the end of discharging the judgments at law; and our opinion is, that the power to do so exists, and that it was properly exercised. It is therefore ordered that the decree below be affirmed, and the Circuit Court is directed to proceed to execute its decree.

Mr. Justice DANIEL dissented, for want of jurisdiction of the courts of the United States over corporations. Marshall v. Balt. & Ohio R. Co., 16 How. 314, 14 L. Ed. 953.

DODGE et al. v. PYROLUSITE MANGANESE CO. et al.

(Supreme Court of Georgia, 1882. 69 Ga. 665.)

Bill filed by the plaintiffs, simple contract creditors of the defendant corporation, for relief, injunction and the appointment of a receiver.

The bill sets out facts which, it alleges, shows the corporation to be insolvent. Among other allegations it is asserted that the assets of the company are greatly exceeded by its liabilities; that its annual receipts are much less than its expenditures; that the management is discordant; that three attachments have been filed for claims aggregating over $55,000; that the company organized under the laws of New York, for the business of mining, has acquired lands to an extent prohibited under the laws of Georgia; that certain officers have failed to account for funds received on account of the corporation; that to proceed at law will involve suits and attachments in various counties of the state, owing to the wide distribution of the company's holdings, with incidental waste and loss to creditors. The prayer is for an injunction to restrain the defendants from interfering with the property or creating any debts or liens thereon; that all creditors be made parties; that sheriffs of the counties where the company's property is situated be enjoined from making levies thereon; that a receiver be appointed; that all property be sold and the proceeds distributed among the creditors. All discovery is waived. Demurrer to the bill on the following grounds: (1) Plaintiffs not judgment creditors. (2) The insolvency of the defendants is not alleged. (3) Plaintiffs have an adequate remedy at law. It further appears that the plaintiffs have commenced attachment proceedings against the defendants' property.

Appeal from a decree sustaining the demurrer.[5]

SPEER, J.[6] * * * It will appear from the foregoing synopsis of the complainants' bill that they are creditors under simple contracts, of this corporation; that they assert or claim no title, interest in, or lien upon the property of this corporation, save and except their attachment liens, which are mere mesne process; and yet with their suits at law levied and pending, they ask a court of chancery to interfere, take charge of this large property of the company, oust its officers of its management, control and direction, place the same in the hands of a receiver to be sold, to await the decree upon their claims, when established by judgment or decree, and that of the other cred-

[5] Statement of facts substituted.

[6] Part of the opinion containing recitals in the bill is omitted.

itors. The decisions of this court upon this subject have been uniform and in harmony with each other so far as our investigation has gone.

Creditors, without lien or title or some interest therein, and who have not reduced their claims to judgment, have, as a general rule, no right to invoke interference by an injunction and appointment of a receiver. This rule has been several times recognized and acted upon by this court. Peyton v. Lamar, 42 Ga. 134; Johnson v. Farnum, 56 Ga. 145; Bessman v. Cronan, 65 Ga. 559.

And even where a creditor has a general judgment, and has levied it, and a claim has been interposed under a pauper affidavit for the purpose of delay, and by reason of the depreciation of the property there is danger of losing the debt, but he shows no special lien, interference by a court of equity was disallowed. Bessman v. Cronan, 65 Ga. 559.

There must be some special circumstances to authorize equitable interference in behalf of a creditor seeking to collect his debt, though it be in judgment, but in such cases they are maintainable upon their own peculiar facts.

Under this general rule, as these complainants show by averment or otherwise neither judgment, nor special lien, nor title, nor interest in the property, they must fall under this general rule, unless the special facts of the case made by the bill, relieve them from its operation. We have looked through with great care and labor this voluminous record, and we cannot find any special facts set forth in complainants' bill that will relieve it from the operation of the general rule so frequently recognized by this court. Here is a foreign corporation doing business in Georgia, where it has a large and valuable property. It certainly cannot be claimed that a court in Georgia has jurisdiction to dissolve this corporation. It is true, as has been alleged, it may be gravely embarrassed with debt. Still its property is accessible here, open and fixed, and no discovery is sought at the hands of any of these defendants to uncover any that may be fraudulently held, and in the absence of any special charge of fraud and concealment, why should the business of this corporation be arrested, its chosen officers displaced, its property taken from their custody, upon the complaint of creditors who have never yet obtained a judgment upon their debts, and who, so far as we know, may never establish such claims?

It must be remembered that this is a bill filed alone in behalf of these creditors, and not as stockholders, and therefore much of their complaint would and might be properly addressed to a court which had jurisdiction to dissolve this corporation, but no such right is insisted on here. These are simple contract creditors without judgment, lien, title or interest in the property of the corporation, beyond what belongs to every creditor. If there should be any fraudulent alienation or concealment of property liable to debts, or the creation of any fraudulent liens upon its property, then the statute affords prompt and speedy remedy by attachment; but because the debtor,

in the opinion of complainants, is not managing its property as wisely and successfully as it might be done, we do not see how this gives a right to ask the interference of a court of chancery. These creditors are already proceeding by attachment; they have levied and fixed their attachment liens, and until they get their judgments, at least, we deem their application to chancery, to take charge of and direct the sale of this large mining interest for the best interest of all parties concerned, at least to be premature. In the future progress of the case after judgments had, if in the then proposed sale of the property and the distribution of the fund they will then need the aid of a court of chancery, under the peculiar circumstances that may then exist, its door will be opened to their complaint.

But to do this in advance of any lien upon, or title, or interest in said property, as appears from this record, we cannot say the court erred in refusing their applications and sustaining the demurrer. Nor can we see how its refusal can be of any serious damage to complainants. The sale of the personalty can be speedily had, under the law; the realty is fixed and immovable; while on the other hand, an interference now, as sought, would necessarily hasten the ruin and insolvency of a corporation which, though embarrassed, may yet recover and proceed to discharge honestly its corporate duties. Judgment affirmed.[7]

HOLLINS v. BRIERFIELD COAL & IRON CO.

(Supreme Court of the United States, 1893. 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.)

The facts in this case are as follows: The Brierfield Coal & Iron Company was incorporated under the laws of Alabama, May 4, 1882. On September 1, 1882, a conveyance was made by the company to Preston B. Plumb, as trustee, to secure an issue of $500,000 in bonds.

[7] Compare The Anvil v. Savery, 116 Ga. 321, 42 S. E. 495 (1902); Finney v. Bennett, 68 Va. 365 (1876); Turnbull v. Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375 (1884).

See Davis v. Edwards, 41 Wash. 480, 84 Pac. 22 (1906).

In Mercantile Trust Co. v. M., K. & T. Ry. Co. (C. C.) 36 Fed. 221, at page 224, 1 L. R. A. 397 (1888), Brewer, J., in passing on a motion for a receiver in foreclosure proceedings under a deed of trust, said: "The right to foreclose does not carry with it a right to a receiver. There are many considerations that bear upon that question. Every case, of course, stands on its own merits. It is difficult to formulate any rule which, briefly stated, will control all cases. It should appear that there is some danger to the property; that for its protection, its preservation, the interests of various holders, require possession by the court, before a receiver should be appointed. It does not go as a matter of course; and yet it is not a matter that a court can refuse simply because it is an annoyance. If, looking at the situation of the litigating parties and of the property, with the prospects of the future, it should appear to a court that they would be benefited, that their interests would be subserved by the appointment of a receiver, why no court—although a matter resting, as it is said, in its discretion—could refuse to make the appointment."

On July 25, 1887, the trustee Plumb, requested a further conveyance and assurance, pursuant to a covenant in the deed of September, 1882, which further conveyance was executed by the company on July 29, 1887. On August 1st, he demanded the surrender of all the company's property to him, as trustee. This was done, and he placed John G. Murray in charge, to control and manage it.

On August 3d, he filed a bill in the circuit court of the United States for the middle district of Alabama, against the company, joining as defendants certain stockholders, bondholders, and creditors, though not the plaintiffs in the present suit. That bill set out the organization of the corporation, the stockholders, with the amounts of stock subscribed, and the amounts paid upon such stock, and alleged that the subscribers were liable for the unpaid subscriptions, but that the assistance of the court was necessary for the assessment of such sums. It also set out the issue of the bonds, and their present owners, so far as known, a default in the payment of the interest due thereon, the property and indebtedness of the company,—the unsecured indebtedness being alleged to amount to about $200,000. The bill further averred that up to that time the chief industry of the company had been the manufacturing of cut nails from iron; that, owing to overproduction in the country, this business had become unprofitable to the company, and that it was desired to change the industry from the manufacture of nails to the production of pig iron, and that it had purchased property with a view to carrying on that industry; that it did not have money enough to successfully carry it on. The bill also alleged that the trustee had taken possession, as authorized by the deed of trust; that he could not carry on the business of the company without obtaining money on the credit of the property; and prayed the direction of the court as to whether he should be permitted to borrow such money, and issue certificates of indebtedness therefor. It asked that all creditors of the corporation, and claimants against the estate, be permitted to make themselves parties, and have their claims adjudicated; that a full administration be had of the estate, and, if need be, a foreclosure and sale.

Subsequently, Plumb resigned as trustee, and W. L. Chambers was substituted in his place. Proceedings were had in that case, which resulted, on July 8, 1889, in a decree for the foreclosure of the trust deed, and a sale of the property. Nearly three months after the commencement of the Plumb suit, and on October 28, 1887, these appellants, as plaintiffs, filed a bill in the same court, making the coal company and sundry stock and bond holders, together with the trustee Plumb, parties defendant. The plaintiffs were unsecured creditors of the company, having claims contracted in 1886 and 1887, four or five years after the issue of the bonds and execution of the trust deed, who sued on behalf of themselves and all other creditors of the coal and iron company, who were willing to come in and contribute to the expenses of the suit. After setting forth their claims, they alleged that

the conveyance to Plumb, as trustee, was absolutely void; that a large amount was still due on the stock. They asked to have a receiver appointed and the property sold in satisfaction of their claims, and that such receiver have authority to collect the unpaid stock subscriptions, to be also applied in satisfaction of their claims. They alleged the pendency of the suit brought by Plumb as trustee, but did not ask to intervene therein. After the decree of foreclosure and sale in the Plumb case, and on July 24, 1889, a final decree was entered, dismissing this bill. From such decree of dismissal, plaintiffs have appealed to this court.

BREWER, J.[8] (after stating the facts). The plaintiffs were simple contract creditors of the company. Their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims, and this notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation. Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804. Nor is it otherwise in case the debtor is a corporation, and an unpaid stock subscription is sought to be reached. Tube-Works Co. v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070; Cattle Co. v. Frank, 148 U. S. 603, 612, 13 Sup. Ct. 691, 37 L. Ed. 577. Nor is this rule changed by the fact that the suit is brought in a court in which at the time is pending another suit for the foreclosure of a mortgage or trust deed upon the property of the debtor.

Doubtless, in such foreclosure suit, the simple contract creditor can intervene, and if he has any equities in respect to the property, whether prior or subsequent to those of the plaintiff, can secure their determination and protection; and here, by the express language of the bill filed by the trustee, all claimants and creditors were invited to present their claims, and have them adjudicated. These plaintiffs did not intervene, though, as shown by the allegations of their bill, they knew of the existence of the foreclosure suit. Neither did they apply for a consolidation of the two suits. On the contrary, the whole drift and scope of their suit was adverse to that brought by the trustee, and in antagonism to the rights claimed by him. They obviously intended to keep away from that suit, and maintain, if possible, an independent proceeding to have the property of the debtor applied to the satisfaction of their claims. But this, as has been decided in the cases cited, cannot be done.

[8] A part of the opinion, discussing the authorities, is omitted.

The excuse suggested, that the rule which forbids in a suit to foreclose a mortgage the litigation of a title adverse to that of the mortgagor prevented them from intervening, is not sound. Their rights, like those of the trustee and the bondholders, were derived from the corporation defendant. Each claimed under it, and the validity and amount of such claims were matters properly and ordinarily considered and determined in a foreclosure suit. It is true the corporation might admit the validity of any or all of the claims, and then the validity could only be a subject of inquiry between the claimants for the purpose of determining the matter of priority; but to that extent, at least, both validity and amount are always open to contest and determination. * * *

But it is earnestly insisted that it has been held by this court (Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004) that whenever a creditor has a trust in his favor, or a lien upon property for a debt due him, he may go into equity without exhausting his legal remedies; that it has also frequently been affirmed that the capital stock and assets of a corporation constitute a trust fund for the benefit of its creditors, which neither the officers nor stockholders can divert or waste; and several cases are cited,—among them, that of Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220, in which, perhaps, the proposition is asserted in the most direct and emphatic language, and Terry v. Anderson, 95 U. S. 628, 636 (24 L. Ed. 365), in which Chief Justice Waite made these observations: "Ordinarily, a creditor must put his demand into judgment against his debtor, and exhaust his remedies at law, before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund, which will be administered by a court of equity, in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee."

While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pom. Eq. Jur. § 1046, they "are not, in any true and complete sense, trusts, and can only be called so by way of analogy or metaphor."

To the same effect are decisions of this court. The case of Graham v. Railroad Co., 102 U. S. 148, 160 (26 L. Ed. 106), was an action by a subsequent creditor to subject certain property, alleged to have been wrongfully conveyed by the corporation debtor, to the satisfaction of his judgment; and the very proposition here presented was then considered, and, in respect to it, the court, by Mr. Justice Bradley, said:

"It is contended, however, by the appellant, that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

"We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property, if not contrary to its charter, as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

"When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

With reference to the suggestion in this last paragraph, it may be observed that the court does not attempt to determine who are proper parties to maintain a suit for the administration of the assets of an insolvent corporation. All that it decides is that, when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them, on the theory that they, in equity, belong to the creditors and stockholders, rather than to the corporation itself. In other words,—and that is the idea which underlies all these expressions in reference to "trust" in connection with the property of a corporation,—the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equi-

ty, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder. * * *

The same idea of equitable lien and trust exists, to some extent, in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves; and the partnership property is therefore sometimes said, not inaptly, to be held in trust for the partnership creditors, or that they have an equitable lien on such property, yet, all that is meant by such expressions is the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust.

A party may deal with a corporation, in respect to its property, in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement, in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and, if there be any exceptions thereto, they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon. * * *

These plaintiffs were simple contract creditors when the trustee's suit was commenced. That suit passed to decree of foreclosure, and up to that time these plaintiffs had acquired no specific lien upon the property. They entered no appearance in that suit, did not intervene, or claim any rights in the property, and they were represented in that suit by the corporation, the party under whom both they and the trustee claimed. A decree of dismissal was therefore proper. It appears in the record as a decree upon the merits. It should have been for want of jurisdiction, and to that extent the decree, as entered, will be modified. The appellants will be charged with all the costs in the case.

Dismissed for want of jurisdiction.

Mr. Justice BROWN and Mr. Justice JACKSON dissent.[9]

[9] Compare Bank of St. Mary's v. St. John Powers & Co., 25 Ala. 566 (1854). See Barber v. International Company of Mexico, 73 Conn. 587, 48 Atl. 758 (1901).

MILLS v. NORTHERN RY. OF BUENOS AYRES CO.

(Court of Appeal in Chancery, 1870. L. R. 5 Ch. App. Cas. 621.)

This was an appeal from an order of Vice-Chancellor Stuart, granting an interlocutory injunction against the Northern Railway of Buenos Ayres Company, Limited, under the following circumstances:

The company was established in July, 1862, and registered under the Companies Act, 1862. Its main object was stated in the memorandum of association to be as follows:

"The making, purchasing, or otherwise acquiring and maintaining, managing, and working of railways and tramways, and other roads and ways, in the state of Buenos Ayres, or in the states of the provinces of the Argentine Confederation, with branches therefrom respectively, and the making or providing of machinery, rolling and other stock, plants, stores, and conveniences, for the purposes thereof, and the conveying passengers, animals, and goods on and to and from the railways, tramways, roads, ways, and branches of the company, and the carrying on the business of a railway and tramway company. But, unless and until the company shall increase their original capital of £250,000., the undertaking of the company shall be confined to a railway and tramway from Buenos Ayres to San Fernando, authorized by the Government concession of the 25th of February, 1862, and to the further extension of the said railway to the River Tigre, and to such of the several objects in the memorandum mentioned as the company shall think necessary, incidental, or advantageous thereto."

Among other subordinate objects were mentioned "the doing of all other things whatsoever which the company shall think directly or indirectly incidental or conducive to any of these objects, or likely to be advantageous to the company in connection therewith, and the doing of all things, and the exercise of all powers contained in the articles of association of the company."

The original capital of the company consisted of £250,000., divided into 1500 guaranteed preference shares of £10. each, 600 deferred preference shares of £10. each, and 4000 ordinary shares of £10. each. By the articles of association it was provided that the company, with the sanction of a general meeting, might increase the capital of the company by the issue of new shares; and power was given to the directors to borrow any sum or sums not exceeding £150,000. on debentures or other securities.

On the 22d of August, 1862, an agreement was made between the company and the firm of E. Murray & Co., which consisted of J. R. Croskey and Eugene Murray, that the firm should construct a single line of railway from the gas works at Buenos Ayres to San Fernando, and a single line of tramway from the custom-house at Buenos Ayres to the station at the gas works. The price fixed was £100,000., which was to be paid partly in cash and partly in ordinary shares of the

company, with an option to the company to pay the whole in cash in lieu of shares. The agreement contained a clause for referring questions between the parties to arbitration.

The works were performed by Messrs. E. Murray & Co., and they received payments in money and shares on account of the contract; but they still claimed £64,849. from the company, partly under the contract and partly for extra works. This debt was disputed by the company, who, on the contrary, claimed that a large sum was due from the firm to the company.

On the 30th of April, 1870, the directors issued a report, in which they stated that they had a balance in hand of net profits of £32,681. 3s. 2d.; that the charge for interest upon the company's loan capital, etc., was £5838. 6s. 2d., leaving, after lending to the capital account £10,350. 17s. 4d. for special expenditure, £16,491. 19s. 8d. available for distribution. The directors recommended that this sum should be applied in payment of the arrears of dividend due to the guaranteed preference shareholders for the eighteen months ending the 30th of June, 1867.

The directors explained, in a subsequent paragraph of their report, that the payment of the arrears out of accumulations of revenue would occupy a considerable time, and that in order to accelerate the desired result a certain amount must be funded; and that as legal difficulties prevented this until the revenue was sufficient to enable the company to declare equivalent dividends, and as expenditure was being incurred in new works and additional plant, which might be legally charged to capital, it was recommended, under the advice of counsel, that the amount expended last year under the above-mentioned heads, as well as that to be expended in the present year and 1871, estimated at about £10,000. should be treated as a payment on capital account, which would be afterwards discharged out of a sum of £20,000. which they purposed to raise by issue of debentures at £6. per cent. The report also recommended the conversion of the tramway from the custom-house to the principal station into a railway adapted for locomotive engines.

This report was adopted at the general meeting of the company held on the 16th of May, 1870, and the sum of £16,491. 19s. 8d. was distributed according to the proposal contained therein.

The bill (paragraph 39) contained the following charge: "The effect of the proposal contained in the report is, that sums which have been paid out of revenue, and ascribed in the accounts of the company to revenue account, are now to be treated as payments on account of capital account, and considered as having been borrowed for the purpose of capital from the revenue, so as to create an apparent or fictitious fund for the payment of shareholders. The money for this purpose is proposed to be raised by means of the issue of debenture stock, and the effect of the proposal is to increase the liabilities of the company by the issue of debenture stock, for the purpose of bor-

rowing money, in order to distribute the same among the shareholders under the guise of revenue."

The plaintiffs were Robert Mills, the executor of Eugene Murray, who was dead, and H. W. Spratt and J. R. Stebbing, the trustees of a deed of assignment executed by J. R. Croskey for the benefit of his creditors. The bill alleged that Mills, as the executor of E. Murray, held some fully paid-up deferred preference shares of £10. each. The bill prayed for an account and payment of what was due to the plaintiffs under the contract, and for other works; and for an injunction to restrain the company from carrying out the proposal in the report, and from issuing any debenture stock or applying any money raised by debenture stock on debentures in payment of any dividend to any of the shareholders, and from declaring or distributing any dividend until they had paid or made provision for paying what was due to the plaintiffs; and also from converting the tramway into a railway until the company had duly increased their original capital. The plaintiffs moved for an injunction in similar terms.

The defendants put in a plea and answer to this bill. They pleaded, first, that the plaintiff Mills had no shares in the company, alleging that he had parted with all the shares which he held as executor of E. Murray before the filing of the bill; and, secondly, that the firm of E. Murray & Co., had not performed the contract on their part, by reason of which default the company had a claim against them exceeding the amount due from the company; and, further, that arbitrators had been appointed by both parties in pursuance of the agreement, by whose arbitration the company were ready to abide.

The plaintiff Mills filed an affidavit, stating that, although it was true that he had transferred all the shares which he held as the executor of Murray, he had done so by way of mortgage only; and that, since the filing of the bill, in order to avoid the objection raised by the plea, he had taken a retransfer of some of the shares from the mortgagor. He also stated that other shares were held by other persons in trust for him and the other plaintiffs.

The Vice-Chancellor granted an injunction as prayed till further order; and from this order the company appealed.

LORD HATHERLEY, L. C.[10] The Vice-Chancellor appears to have formed his judgment in this case, partly at least, upon the view which he took that one of the plaintiffs, Mr. Mills, was a shareholder in the company, and therefore had a right to interfere. But, so far as the case rests on the simple fact of the plaintiffs being creditors of the company, it seems to me hardly capable of argument. Work is done for a limited company; no engagement is taken from them by way of security; no debenture or mortgage is granted by them; but the work is done simply on the credit of the company. The only remedy for a creditor in that case is to obtain his judgment and to take out

[10] A part of the opinion is omitted.

execution; or it may be that he may have a power, if the case warrants it, of applying to wind up the company. But it is wholly unprecedented for a mere creditor to say, "Certain transactions are taking place within the company, and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed to see whether or not they are doing what is ultra vires, and to interfere in order that, as by a bill quia timet, I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment."

The case must have occurred, of course, many years ago, before joint stock companies were so abundant, but certainly within the last twenty or thirty years the money due to creditors must have been many millions, and the number of creditors must have been many thousands; yet I have never before heard—and I asked in vain for any such precedent—of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this Court on the ground that he, having no interest in the company except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not established in a court of justice, but which he was about to proceed to establish. If there is this power in any case, of course it would apply not only to the raising of money by debentures and to paying shareholders, but it would extend to an interference in every possible way with the dealings of the company. * * *

I think, therefore, that the motion for an injunction ought to have been refused with costs; and I make an order to that effect.[11]

POND et al. v. FRAMINGHAM & L. R. CO.

(Supreme Judicial Court of Massachusetts, 1881. 130 Mass. 194.)

MORTON, J. This is a bill in equity, the substantial allegations of which are, that the plaintiffs are creditors of the defendant corporation; that the corporation is insolvent; that all its property is mortgaged to trustees for the benefit of one class of creditors; that it owes large amounts to other creditors, one of whom has attached all its property; that it is about to execute a lease to said attaching creditor for the term of 999 years, at a rental which will not pay the interest upon its indebtedness; and that the execution of said lease would be injurious to the interest of its creditors and stockholders. The

[11] Compare Kearris v. Leaf, 1 H. & M. 681 (1862).

prayer is for an injunction to restrain the defendant from further prosecuting its business, and for the appointment of receivers.

There is no statute giving this court equity jurisdiction in such a case as this, and the bill does not state a case within the general equity powers of a court of chancery. As is stated in Treadwell v. Salisbury Mfg. Co., 7 Gray, 393, 66 Am. Dec. 490, "it is too well settled to admit of question, that a court of chancery has no peculiar jurisdiction over corporations, to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief."

The plaintiffs cannot maintain this bill, unless upon the ground that any creditor can maintain a bill in equity against an individual debtor upon like allegations. But there is no allegation of fraud or breach of trust, or any other ground of jurisdiction, which brings the case within the general equity powers of a court of chancery. The bill is an attempt by a creditor to restrain his debtor from making what is alleged to be an improvident contract. The rights of the parties are governed by the rules of the common law. The plaintiffs as creditors might by an attachment have obtained security which would take precedence of the contemplated lease; but if they could not, the court has no power to restrain the debtor from making a disposition of his property which is permitted by the common law, unless fraud or a breach of trust is alleged and shown.

The allegation that the defendant corporation is insolvent does not aid the plaintiffs. In the absence of any statute giving the power, this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation.

Decree dismissing the bill affirmed.

GRAHAM v. LA CROSSE & M. R. CO.

(Supreme Court of the United States, 1880. 102 U. S. 148, 26 L. Ed. 106.)

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

BRADLEY, J.[12] In September, 1855, the La Crosse & Milwaukee Railroad Company not being at that time, so far as appears, indebted in any considerable amount, sold certain lands in the city of Milwaukee not then wanted for railroad purposes to Charles D. Nash for the sum of $25,000. The officers of the company who took a leading part in negotiating the sale are charged to have been interested in the purchase, and to have furnished Nash the means for

[12] Statement of facts omitted, as sufficiently stated in the opinion, and a part of the opinion, discussing the authorities, is omitted.

effecting it. At all events, shortly after it was made, Nash conveyed the property, for the original consideration, to Moses Kneeland, one of the officers referred to, and Kneeland, retaining one-third part, subsequently conveyed the other two-third parts to Ludington and Kilbourn, they all being directors of the company, and members of the executive committee. The company itself never questioned the fairness of this transaction; on the contrary, the sale was subsequently (in March, 1858) expressly confirmed by the board of directors, and a further quitclaim deed executed by the company in confirmation thereof. In September and November, 1858, the appellants recovered two judgments against the company for indebtedness on contract, arising after the sale of the lands, and issued executions thereon, under which levies were made on said lands, as lands of the company.

In January, 1860, the appellants, having sued on these judgments in the United States Court, recovered a second judgment for upwards of $40,000, issued execution thereon, and made another levy on the lands. Being unwilling to attempt a sale under their said execution in consequence of the deeds for the lands being recorded, the appellants, in June, 1860, filed the bill in this case against Kneeland, Kilbourn, Ludington, and the railroad company, setting forth their said judgments, executions, and levies, stating the fact of the said sale to Nash, and his conveyance to Kneeland, and the latter's conveyance to the other parties; alleging that the transaction was a fraud against the corporation and its creditors, and complaining that the said conveyances of the lands were a cloud upon their right to sell the lands under execution, and an impediment in the way of the execution of their writ of fieri facias; and prayed that the lands might be decreed subject to the lien of their judgment; that they might be decreed to be authorized to sell the same, or so much as might be necessary for the purpose of satisfying their judgment; and that Kneeland, Kilbourn, and Ludington might join in the conveyance, and might be restrained from claiming the land; and that the conveyances to them might be declared null and void. The bill, amongst other things, averred that the lands were sold to Nash for much less than their real value; but it contained no allegation that the company was insolvent, or that it had not other assets available under an execution; nor was any offer made to repay the consideration which the purchaser had given for the lands.

To this bill the defendants severally filed answers, denying that the lands were worth more than $25,000 at the time of sale; averring that the sale was made in good faith, and with the company's concurrence, and setting forth in detail many circumstances tending to show that the title was involved and embarrassed; that they required large outlays of money to render them available; that the company had offered them for sale in the market; and was unable

to get from any other person the price paid for them by Nash; that although Nash was requested to purchase the lands by Kneeland, and was aided by him in paying therefor, yet Nash had the option to keep them; but after making the purchase and inquiring into the title and situation of the lands, he asked to be relieved from the purchase, and that thereupon Kneeland, Kilbourn, and Ludington took them off his hands.

The parties went into proofs, and it appears that the company had, for months prior to the sale, been endeavoring to dispose of the lands, and could get no purchaser at the price offered by Nash; and the leading statements of the answer, as to the title and situation of the lands, were verified. It also appeared that the railroad company never objected to the sale, but that it was expressly confirmed in March, 1858, by a resolution of the board of directors, as before noticed.

Various transactions subsequently took place, by which other parties became interested in the lands, and in the affairs and property of the railroad company, which are fully developed in the supplemental proceedings and proofs; but it is unnecessary to notice them further. The foregoing statement exhibits the leading features of the case as presented for our consideration.

The main question is, whether the sale to Nash, made before the railroad company became indebted to the appellants, and when for all that appears it was perfectly solvent, even though made for the use and benefit of the officers referred to, can be set aside at the instance of the complainants, for the purpose of subjecting the lands to sale under their execution. And this question, we think, must be answered in the negative.

It is a well-settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, disposes of property, for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. They are not injured. They gave credit to the debtor in the status which he had after the voluntary conveyance was made.

The authorities on this subject are fully collected in the notes to Sexton v. Wheaton, 1 Am. L. Cas. 1, and in the opinion of Mr. Chief Justice Marshall in that case; and the general doctrine is affirmed in Mattingly v. Nye, 8 Wall. 370, 19 L. Ed. 380.

It is true that if a debtor dispose of his property, with intent to defraud those to whom he expects to become immediately or soon indebted, this may be a fraud against them, which they may have a right to unravel. But that is a special case, to which the present bears no resemblance. It is not pretended that the railroad company disposed of the property in question for the purpose of defrauding creditors, much less for the purpose of defrauding those who afterwards in due course of business might become its creditors.

But it is contended that this is a case in which the debtor corporation was defrauded of its property, and that as the company had a right of proceeding for its recovery, any of its judgment and execution creditors have an equal right; that it is a property right, and one that inures to the benefit of creditors.

Conceding that creditors who were such when the fraudulent procurement of the debtor's property occurred,—and cases to that effect have been cited,—the question still remains, whether, the debtor being unwilling to disturb the transaction, subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts. We doubt whether any case going as far as this, can be found. No such case has been cited in the argument. Dicta of judges to that effect may undoubtedly be produced, but they are not supported by the facts of the cases under consideration.

It seems clear that subsequent creditors have no better right than subsequent purchasers, to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right. In French v. Shotwell, 5 Johns. Ch. (N. Y.) 555, Chancellor Kent decided, upon full consideration, that when a party to a judgment entered upon a warrant of attorney, voluntarily waives his defence or remedy on the ground of fraud or usury, and releases the other party, a subsequent purchaser under him, with notice of the judgment, will not be allowed to impeach it, or to investigate the merits of the original transaction between the original parties; and he dismissed a bill filed by the subsequent purchaser for relief in such a case. The Chancellor said: "If the party himself who is the victim of fraud or usury chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him to recall and assume the remedy for him. If a judgment was fraudulent by collusion between the parties to it, on purpose to defraud a subsequent purchaser, the case would present a very different question. But if the judgment was fraudulent only as between the parties, it is for the injured party alone to apply the remedy. If he chooses to waive it and discharge the party, it cannot consist in justice or sound policy, that a subsequent voluntary purchaser, knowing of that judgment, should be competent to investigate the merits of the original transaction as between the original parties. Quisque potest renunciare jure pro se introducto. * * * It is stated to have been a principle of the common law that a fraud could only be avoided by him who had a prior interest in the estate affected by the fraud, and not by him who subsequently to the fraud acquired an interest in the estate. Upton v. Basset, Cro. Eliz. 445, and recognized in 3 Co. 83 a."

This decision of Chancellor Kent was afterwards nearly unanimously affirmed by the Court of Errors. French v. Shotwell, 20 Johns. (N. Y.) 668.

When the question of the right of a creditor to set aside a conveyance procured from the debtor by fraud first came before the courts in England, it was held that the debtor's own right was merely the right to file a bill in equity against the fraudulent grantee adversely; and if he did not see fit to take such a proceeding, his creditor had no such privity with the transaction as to enable him to obtain relief, even though the debtor should assign his supposed right to the creditor; that the transaction savored of champerty, and was opposed; at least, to the spirit of the law against champerty and maintenance. This was the substance of the decision by the Court of Exchequer in 1835, in Prosser v. Edmonds, 1 Y. & C. 481. Lord Abinger treated the case as a new one, and at the close of the argument remarked that his impression was that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. He afterwards gave a deliberate opinion upon the point. In that case, an executor and trustee had fraudulently procured an assignment of his brother-in-law's interest in the estate, knowing its value, which was unknown to the assignor. A subsequent creditor of the assignor, to whom he assigned his whole interest in the estate, filed a bill to set aside the assignment to the trustee. Lord Abinger distinguished the case from that of an assignment of a chose in action, as a note not negotiable, or a bond, or a mortgage, or an equity of redemption, where possession of the thing assigned is delivered to the assignee: and treated it as an assignment of a mere naked right to file a bill in equity, in which the last assignee purchased nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. "What is this," says the Lord Chief Baron, "but the purchase of a mere right to recover? It is a rule, not of our law alone, but of that of all countries (Voet ad Pandect, lib. 41, tit. 1, sect. 38), that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount properly to maintenance or champerty, yet of which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice." "Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity." These remarks are very broad, and would apply to the case of existing as well as subsequent creditors; though the case itself was that of a subsequent creditor. It forms the subject of a section in Story's Commentaries on Equity

(Section 1040h), where, in a note, Lord Abinger's opinion is extensively quoted; and it has been followed by other very respectable authorities, and, as applied to subsequent creditors, at least, we think that the reasoning is sound. * * *

The principle that subsequent creditors cannot question a voluntary or fraudulent disposition of property by their debtor, not intended as a fraud against them, is especially applicable in cases of constructive fraud, like that charged in the present bill. Suppose it be true, that the purchase of the lands in question by or for the benefit of officers of the company actively concerned in the transaction could be set aside at the instance of the company as a constructive fraud, yet if there was no actual fraud, if the company received full consideration for the property sold, how can it be said that subsequent creditors of the company are injured?

In the present case we are satisfied from the evidence that the property was sold for its fair value at the time, and that no actual loss accrued to the railroad company's estate.

It would be unjust and a great hardship, therefore, on the mere ground of the constructive fraud, to allow creditors who had no interest at the time to seize and dispose of the property sold.

It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be ques-

tioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each.

We think that the present bill cannot be maintained. Decree affirmed.[18]

SECTION 2.—CREDITORS' RIGHTS AGAINST TRANSFEREES OF CORPORATE PROPERTY

CURSON v. AFRICAN CO.

(High Court of Chancery, 1682. 1 Vern. 121.)

It was objected against the plaintiff, that he had not brought proper parties to hearing, the bill being to be relieved for a debt owing from the Old African Company, and they had brought to hearing the New African Company only.

THE LORD KEEPER (Sir FRANCIS NORTH) objected, that the old company were in a manner in nubibus, though their charter was not surrendered, as was objected at the bar, for he knew how that matter was. The old company were almost two hundred thousand pounds in debt; so that their credit was lost, and they could not carry on their trade; and therefore, that the trade might not be lost to the nation, it was necessary that a new company should be erected, which was so done; and the King accepted no surrender from the old company of their charter; but they are a company still in being: the new company (which in truth are almost all the same men as were of the old company) bought the old company's stock and effects at the true value, and the money was to be applied for payment of the debts of the old company: but that, which stuck with him in this case, was, he did not see how a company that had no estate could be compelled to appear. Upon which it was urged, the plaintiff might take out a distringas against the company, and have it returned nihil, and so get a sequestration against them; and then by the course of the court the plaintiff need not to bring them to hearing. But then for the plaintiff it was said, that the plaintiff had an order made in this cause that the defendants should take no advantage at the hearing for want of proper parties: to which it was replied, such an order was in itself void, and could not take away the defendant's just exceptions, unless it had been by consent.

LORD KEEPER ordered the plaintiff's counsel to go on and open the cause: and after debate the plaintiff agreeing to take, as other creditors had done, £40. per cent. with interest for his money, he was

[18] Accord: Hamilton v. Menominie Falls Quarry Co., 106 Wis. 352, 81 N. W. 876 (1900).

ordered so to do: and was likewise ordered to allow £100. debt that was owing by him to the company: for that it is the custom of companies, that if they owe a man £100. they will give him credit for so much; and therefore in respect of a company, stoppage is to be allowed as a good payment.[14]

BELLOWS v. HALLOWELL & AUGUSTA BANK.

(Circuit Court of the United States, District of Massachusetts, 1819. 2 Mason, 31, Fed. Cas. No. 1,279.)

Action of assumpsit to recover from the defendant corporation, the amount of certain promissory notes issued by the late Hallowell & Augusta Bank. The judgment of the district court of Maine for the defendant is brought on writ of error to this court.

The trial jury returned a special verdict, the findings of which, essential to the appeal, appear in the opinion.[15]

STORY, Circuit Justice.[16] * * * The plaintiff contends for a reversal of the judgment, in the first place, because the notes in question were made by, and are obligatory upon, the defendants in their corporate capacity. If this ground fail him, he next contends that the defendants have adopted and made the notes their own by the declaration and conduct of their officers. If this position cannot be sustained, he contends in the last place, that the defendants have the funds of the old bank in their possession appropriated to the payment of the notes of the old bank, and that the plaintiff, as holder of the notes now in question, is entitled to so much of these funds as equals the amount of his notes, as money had and received to his use.

The first ground rests on the suggestion that the old bank and new bank are the same corporation, the new charter being but a reincorporation or rather a continuation of the charter of the old bank, which would otherwise have expired by its own limitation. If the premises were well founded, the conclusion would certainly follow, that the new bank is liable for the debts of the old bank. Mayor, etc., of Colchester v. Seaber, 3 Burrows, 1866; Scarborough v. Butler, 3 Lev. 237; Rex v. Pasmore, 3 Term, R. 199; Luttrel's Case, 4 Coke, 87. But we are called upon to admit these premises not upon the plain and positive enactments of the statute incorporating the new bank, but upon the collateral facts, that the names of both corporations are the same, the officers are the same, and a majority of the stockholders are the same; and that the business of the old bank was for a time done, and its debts paid, by the new bank.

It is certainly true that a corporation may retain its personal iden-

[14] See National Bank of Jefferson v. Texas Investment Company, 74 Tex. 421, 12 S. W. 101 (1889).

[15] Statement of facts substituted.

[16] A part of the opinion is omitted.

tity, although its members are perpetually changing; for it is its artificial character, powers and franchises, and not the natural character of its members, which constitute that identity. And for the same reason corporations may be different, although the names, the officers, and the members of each are the same. An insurance company composed of the same natural persons and officers, and with the same name as an existing incorporated bank, would still be a different corporation from the bank. The similarity of name, of officers, or of members, or even of objects, cannot then, per se, establish the identity of corporations created at different times, by different charters, and having a distinct independent being. And one corporation may transact the business and pay the debts of another corporation without thereby merging in the latter its distinct corporate existence. There is indeed a repugnancy in the statement of the proposition that two corporations are in point of law the same, for it would at the same time establish that there is but one corporation.

To ascertain whether a charter create a new corporation, or merely continue the existence of an old one, we must look to its terms and give them a construction consistent with the legislative intent and the intent of the corporators. In the present case, the charter of the old bank was granted by the act of the 6th of March, 1804, and was to continue from the first Monday of October, then next ensuing, until the expiration of eight years. 3 Mass. Gen. Laws, 206. Its existence was therefore limited to the first Monday of October, 1812; and by an act of the 24th of June, 1812, c. 57, all banks incorporated under the authority of the commonwealth, whose corporate powers were limited by law to or at any time before the last day of October then next ensuing, were authorized to continue corporations until the first Monday of October, 1816, and no longer, for the sole purpose of enabling such banks gradually to settle their concerns and divide their capital stock. And the act contains an express prohibition of their acting as corporations for banking generally. This certainly shows a determination on the part of the legislature not to renew or to perpetuate the existence of any of the banks within the purview of the act; and among these the old bank was unquestionably included.

The charter of the new bank was granted by an act of the 23d of June, 1812, c. 47, while the old bank was in existence. It does not purport upon its face to be a grant to an existing corporation, but to private individuals. Its capital stock is less by $50,000 than that of the old bank. The stock is to be held, not by the stockholders of the old bank, but by certain persons named in the act, and their associates and assigns. The act refers also to the old bank, as an existing corporation, and declares, not that the directors of the old bank shall be the directors of the new, but that "any director of the Hallowell & Augusta Bank, now existing, may be eligible as a director of the bank hereby established." It further declares that the new bank may

take, receive and hold, by assignment, any mortgages held by the old bank "which may be assigned and taken by agreement between the two corporations." This clause affords abundant evidence that the new charter was not granted to the old corporation, for it contemplates assignments of mortgages between the two banks as distinct corporations; and it would be utterly absurd to say that a corporation might contract with, or make conveyances to, itself.

Upon the very face of the charter, then, enough appears to show, that the legislature contemplated the erection of a new corporation. And if the language had not been so express, the same must have been the conclusion of law; for every charter must be taken to be a grant of a new corporation, unless it be granted to an existing corporation. If indeed the new charter had been granted to the old bank, it would not have been binding until it was accepted by it; and there is not the least pretence to say upon this record, that the old bank ever accepted the new charter, or could by law have claimed it as a grant in its corporate capacity. There is then an end of the argument raised on the first point. * * *

The questions in this cause have been discussed and decided in the supreme court of this state in another cause, (Wyman v. Hallowell & Augusta Bank, 14 Mass. 58;) and I may therefore be well saved a more minute examination of the principles applicable to them, since I entirely concur in that decision.

Let the judgment be affirmed.[17]

COLE v. MILLERTON IRON CO. et al.

(Supreme Court of New York, 1892. 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615.)

FINCH, J.[18] The plaintiff is a creditor of the National Mining Company, a corporation formed and existing under the laws of this state. He commenced an action to recover damages done to his property by the wrongful act of the corporation, serving the summons in October, 1887, and recovering judgment in July of the next year. During the pendency of the action all the property and assets of the debtor corporation were transferred to the Millerton Iron Company, also a domestic corporation, upon a nominal consideration, except an assumption by the vendee of the debts of the vendor; and thereupon the former executed a mortgage to the Mercantile Trust Company

[17] Accord: Marshall v. Western N. C. Ry. Co., 92 N. C. 322 (1885).
See Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155 (1884); Clough v. Rocky Mountain Oil Co., 25 Colo. 520, 55 Pac. 809 (1898); Higgins v. California Petroleum, etc., Co., 122 Cal. 373, 55 Pac. 155 (1898); Allen v. North Des Moines M. E. Church et al., 127 Iowa, 96. 102 N. W. 808, 69 L. R. A. 255, 109 Am. St. Rep. 366, 4 Ann. Cas. 257 (1905).

[18] Statement of facts omitted, as sufficiently stated in opinion of the court.

covering all its property, including that acquired from the National Mining Company. When the plaintiff obtained his judgment nothing remained upon which it was a lien, and his execution was returned unsatisfied. He then began this action, in which he assailed the transfers made, with a view of subjecting the property of the debtor corporation to the satisfaction of his debt. Upon the trial his complaint was dismissed, but the general term reversed the judgment, and ordered a new trial. From that order the trust company alone appeals, and has given the usual stipulation for judgment absolute.

The trial court has refused to find that the National Company was insolvent at the date of its transfer, but did find that such transfer suspended and terminated the regular business of the grantor, and was made and accepted with that purpose and intention. The practical effect was to dissolve the grantor corporation, and subject its charter to forfeiture at the hands of the state, for it voluntarily stripped itself of all its property and assets, and became incapable, and intended to be and remain incapable, of performing its corporate duties. Such a transfer, which involves the destruction of the corporation and an abandonment of the purposes of its organization, is illegal as against creditors whose rights are thereby sacrificed and their remedies destroyed. The transfer was illegal also because made in contemplation of insolvency. Those who accomplished it knew that its necessary, and the inevitable, effect would be to make the corporation unable to pay its debts, and must be held to have intended that consequence of their acts.

I do not agree to that reading of the statute which limits its prohibition to cases in which payment of some note or obligation has been previously refused. An interpretation so narrow would seriously maim and distort the obvious purpose of the statute, and make a transfer in contemplation of insolvency good the day before a note matured, and bad the day after. As against the creditor, the transfer to the Millerton Company was illegal, and in fraud of his rights. The assets of a corporation are a trust fund for the payment of its debts, upon which the creditors have an equitable lien, both as against the stockholders and all transferees except those purchasing in good faith and for value. Bartlett v. Drew, 57 N. Y. 587; Brum v. Insurance Co. (C. C.) 16 Fed. 143; Mor. Corp. § 791. The Millerton Company was not such a purchaser. It parted with nothing. It knew and participated in the illegal purpose to destroy the National Company, to make it utterly insolvent, and to deprive its creditors of the trust fund upon which they had a right to rely; and so they were at liberty to set aside the transfer so far as it barred their remedy, and to enforce their equitable lien upon the property in the hands of the transferee.

It is not a sufficient answer to say that the transfer was rather formal than real, because before its occurrence the Millerton Company, having the same stockholders and officers, managed and conducted the business of the National Company before the transfer as well as after,

and that what occurred was a practical consolidation. Companies may consolidate, but under the permission and safeguards of the statute, all of which were disregarded; and what is called the "formal transaction" cuts off and destroys the right of the creditor, and is being used for that exact purpose.

Neither is it an answer to say that the creditor is not harmed by a change of the party liable to pay, unless there be some disproportion in the assets. He cannot be forced to change his debtor against his will, and it appears in the proof that the transfer to the Millerton Company was followed by a mortgage sweeping into its lien and peril the very property transferred.

We are satisfied, therefore, that the plaintiff was entitled to judgment of sequestration and for a receiver, and so the order of the general term was right. The judgment obtained by Chapman is not a bar to the remedy. It is not relied upon for that purpose, and the appointment of the receiver was without notice to the attorney general, as the law required. Laws 1883, c. 378. In the present case the plaintiff must give such notice when he applies for the appointment.

The rights of the mortgagee, who is the present appellant, need not now be accurately determined. Whether that mortgage was valid at all, for want of proper consents, or whether any of the bondholders have acquired equities superior to those of the plaintiff, may or may not become questions in the future. Enough appears to show that some of them do not stand in the attitude of bona fide creditors, and that the remedies of all may be confined to the property of the Millerton Company not derived from the National until, at least, the former is exhausted. Those questions, however, may be left to the developments consequent upon further proceedings. The order of the general term should be affirmed, and a judgment absolute for the plaintiff be rendered upon the stipulation, with costs. All concur.

Order affirmed and judgment accordingly.[19]

Ex parte SAVINGS BANK OF ROCK HILL.

WHITE v. COMMERCIAL & FARMERS' BANK OF ROCK HILL.

(Supreme Court of South Carolina, 1905. 73 S. C. 393, 53 S. E. 614, 5 L. R. A. [N. S.] 520.)

GARY, A. J.[20] This is a petition on the part of two stockholders of the Savings Bank of Rock Hill, praying that certain assets formerly belonging to said bank be applied to the extinguishment of the claim

[19] See Goddard v. Importing Co., 9 Colo. App. 306, 48 Pac. 279 (1897).

[20] Facts stated in the opinion, a part of which is omitted.

upon which suit was brought against them by a creditor of the bank. The facts are as follows:

In 1898, the Savings Bank of Rock Hill decided to go into liquidation. At that time it was in a sound financial condition, with assets sufficient to pay all outstanding liabilities, and $133 on each share of stock. Sufficient assets of the bank were turned over to the National Bank of Rock Hill, to pay the stockholders of the Savings Bank 80 per cent. upon their shares of stock. These stockholders and those of the National Bank combined and formed the National Union Bank of Rock Hill. Subsequently, the remaining assets of the Savings Bank, amounting to about $67,000 were sold to the Commercial & Farmers' Bank, with the understanding that it would pay to the stockholders of the Savings Bank $53 per share, and also, the outstanding liabilities of the latter bank, which assets were sufficient for that purpose. The transfer of the assets was made in good faith. The Commercial & Farmers' Bank was then solvent, and all stockholders and creditors who presented their claims were promptly paid.

One of the outstanding obligations of the Savings Bank, at the time its remaining assets were transferred to the Commercial & Farmers' Bank, was a certificate of deposit for $1,000, issued by the Savings Bank to A. A. McDonnough, who was a nonresident and died outside the state. His certificate of deposit was not presented by his legal representative until the Commercial & Farmers' Bank had become insolvent and gone into the hands of a receiver. Among the assets of the Savings Bank transferred or sold to the Commercial & Farmers' Bank, were a note and mortgage on a tract of land. for several thousand dollars, executed by J. Edgar Poag: The mortgage was foreclosed, and the land conveyed to the said receiver, who, as such, is now in possession thereof. The administrator of McDonnough's estate recovered judgment against the Savings Bank in 1903; execution was issued, and after a return of nulla bona, he commenced action against the petitioners.

The administrator proved said claim, against the Commercial & Farmers' Bank, after it became insolvent, without the assertion of a lien on the proceeds arising from the sale of the Poag property, and has received a dividend from that bank, amounting to $361.83.

The special referee finds that the administrator did not thereby waive any of his rights in the premises. The special referee recommended that the prayer of the petition be granted, and based his conclusion on the principles stated in 10 Enc. p. 1367d.

On hearing the exceptions to the report of the special referee, his honor, the circuit judge, filed a decree, in which he stated that he concurred with the special referee in all his conclusions except that in which he held that the creditor of the Savings Bank has a priority over the creditors of the Commercial & Farmers' Bank to be paid out of the Poag mortgage. This, then, is the vital question in the case, and

involves the construction of the agreement, under which the Commercial & Farmers' Bank came into possession of the said assets.

The only facts which the special referee found as to the terms of the contract are, "that the remaining assets of the Savings Bank, amounting, according to the statement submitted before me, to $67,000, were then sold to the Commercial & Farmers' Bank, another new bank just organized and commencing business, with the understanding that the Commercial & Farmers' Bank would pay to the stockholders of the Savings Bank $53 per share, and also pay the outstanding liabilities of the Savings Bank."

1. It will be well, at the outset, to determine the relation which the Savings Bank sustained to its assets and creditors. In the case of Railroad Co. v. Howard, 7 Wall. 392, 409, 19 L. Ed. 117, the doctrine is thus announced: "Equity regards the property of a corporation, as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it, into whosesoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the profits, until all the debts of the corporation are paid. * * * If the fund has been distributed among the stockholders, or passed into the hands of other than bona fide creditors or purchasers, leaving any debts of the corporation unpaid, the established rule in equity is, that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts. * * * Creditors are preferred to stockholders, on account of the peculiar trust in their favor, and because the latter, as constituent members of the corporate body, are regarded as sustaining in that respect the same relation to the former as that sustained by the corporation." These principles are recognized in the case of Dabney v. Bank, 3 S. C. 124.

It is thus made apparent that the assets, while in the hands of the Savings Bank, were a trust fund for the payment of its creditors. Our interpretation of the contract is, that although it was the intention of the parties to vest the legal title to the assets in the Commercial & Farmers' Bank, it was, nevertheless, likewise intended that the last mentioned bank should assume the same relation to the assets and creditors that was imposed on the Savings Bank. In other words, that the Commercial & Farmers' Bank was substituted in the place of the Savings Bank, with all its rights, and with all the incidental burdens, relative to said assets and creditors. The Commercial & Farmers' Bank came into possession of the assets knowing that they were impressed with a trust. It entered into an agreement to discharge all the duties that rested upon the Savings Bank as a trustee, in so far as they affected the rights of its creditors. Having undertaken to discharge the duties of a trustee, it must be regarded as a trustee. One of the duties which it must be held to have assumed under the terms of the agree-

ment, was to administer the trust estate which came into its possession, in such a manner that the trust would be carried into effect and not defeated.

There was no intention to deprive the creditors of their right to subject the assets to the payment of their claims, as long as the assets remained in the hands of the substituted trustee. Furthermore, when the assets were disposed of, the Savings Bank did not receive the consideration in money, which would have become an asset out of which its creditors could have been paid; but the consideration was a promise on the part of the Commercial & Farmers' Bank which it did not wholly fulfill. The administrator of McDonnough's estate, therefore, stands upon higher ground than the creditors of the Commercial & Farmers' Bank, as to the proceeds arising from the foreclosure of the mortgage executed by Poag. * * *

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for the sole purpose mentioned in the opinion.[21]

LUEDECKE v. DES MOINES CABINET CO. et al.

(Supreme Court of Iowa, 1908. 140 Iowa, 223, 118 N. W. 456, 32 L. R. A. [N. S.] 616.)

DEEMER, J.[22] Plaintiff recovered judgment against the Des Moines Cabinet Company December 31, 1900, in the sum of $325 for breach of a contract of employment. The cabinet company was a corporation organized under the laws of this state, and at all times material to our inquiry the entire stock of the corporation was owned by defendant Hartung. On the 15th day of August, 1900, and after plaintiff had commenced his suit against the cabinet company, Hartung, as president of that company, sold and transferred to the Wells & Antes Undertaking Company, also an Iowa corporation, all the assets of the cabinet company, the consideration named being $3,500. Instead of cash Hartung individually received 35 shares of the stock of the undertaking company, which he immediately hypothecated for his private account. Plaintiff, after obtaining his judgment, caused execution to issue against the cabinet company, which was returned no property found. He thereupon brought this suit in equity, alleging that when the undertaking company purchased the property, it knew of plaintiff's claim, and with intent to hinder, delay, and defraud him it took possession of all the assets of the cabinet company, and converted the same to its own use without other consideration than the issuance of its own stock in payment therefor; that by reason of the transfer

[21] Compare Hibernia Ins. Co. v. St. Louis & New Orleans Transp. Co. (C. C.) 13 Fed. 516 (1882).

[22] Statement of facts omitted, as sufficiently stated in the opinion.

the undertaking company became possessed of all of the assets of the cabinet company, leaving nothing for the payment of its debts.

Upon the trial plaintiff withdrew all charges of fraud and deceit, "except such fraud as may arise from the transaction between the parties at law." As we understand it, plaintiff relies upon a single proposition in this case, and this is that, where one corporation transfers all its assets to another corporation, and thus practically ceases to exist without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, and this without reference to the question of actual fraud. If the affirmative of this proposition be held, it must be upon the theory that the assets of a corporation are in the nature of a trust fund for the payment of its debts, and that a sale of the entire property works a dissolution of the selling corporation, and justifies an accounting at the suit of creditors. Plaintiff also claims that under the facts disclosed by this record he became entitled to a judgment against the undertaking company and its successor in interest for the amount of the judgment he obtained against the cabinet company. The trial court was evidently of this opinion, for it rendered judgment against all the defendants personally, and also established a lien to the amount of the judgment against the property of the cabinet company sold by Hartung to the undertaking company, and directed its sale under special execution.

Appellants challenge that part of the decree rendering personal judgment against the undertaking company, the successor to the assets of the cabinet company, and we are constrained to sustain them in this position. In order to render the purchasing company personally liable for the debts of the selling corporation, it must appear that (a) there be an agreement to assume such debts; (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; or (c) that the purchasing corporation was a mere continuation of the selling corporation; or (d) that the transaction was fraudulent in fact. Baker v. Hall, 76 Neb. 88, 107 N. W. 117, 111 N. W. 129, 113 N. W. 267; Sharples v. Harding, 78 Neb. 795, 111 N. W. 783, 11 L. R. A (N. S.) 863; Allen v. Church, 127 Iowa, 96, 102 N. W. 810, 69 L. R. A. 255, 109 Am. St. Rep. 366, 4 Ann. Cas. 257; Chase v. Telephone Co., 121 Mich. 631, 80 N. W. 717; Ewing v. Composite Co., 169 Mass. 72, 47 N. E. 241, and other like cases. None of these things appear in this case, and in our opinion the court was in error in rendering a personal judgment against the purchasing corporation.

Little is said specifically of that part of the decree which establishes plaintiff's judgment against the cabinet company as a lien upon the property purchased by the undertaking company, although we assume that appellants' counsel are adopting the same theories with reference thereto that they urge against the personal judgment. The cases they

cite do not go to this extent, however, although there are some which sustain the proposition that the purchasing corporation takes the property free from all debts or claims against the selling one. A great many authorities in this country hold to the doctrine that, if one corporation transfers all its assets to another, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation. Some courts announce a modified doctrine declaring that the principle has no application to a sale made in the usual course of business, nor to a bona fide sale for a full consideration in cash or its equivalent. Although announcing in general terms the first proposition, we are probably committed to the modified one in Warfield v. Marshall Canning Co., 72 Iowa, 666, 34 N. W. 467, 2 Am. St. Rep. 263. It has been broadly asserted by courts of the highest standing that the capital stock of a corporation is a fund for the payment of its debts. "It is a trust fund of which the directors are trustees. * * * The capital stock paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away." Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203.

This modern or so-called American doctrine has never been recognized in England, nor does it exist at common law; and, while at one time quite generally adopted in this country, it is now believed to be unsupported to its full extent by any considerable number of courts. Indeed the court which first announced it has largely receded from its former position, and now says that no trust in its true sense exists; that all that was intended by the previous expressions was to announce the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party, has taken possession of its assets. "It is never understood that there is a specific lien or a direct trust." See Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. We have recently gone over this matter in the case of State Trust Co. v. Turner, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136, and have repudiated the trust-fund doctrine as broadly announced in some of the earlier cases in this country. The creditors of a corporation in a proper case have an equitable right or lien upon the assets of a corporation. But a corporation, like a partnership, may transfer its property in good faith to a bona fide purchaser, and such purchaser will hold it free from the debts of the corporation.

The statutes of this state, however, prohibit the diversion of corporate funds to other objects than those mentioned in its articles (Code, § 1621), and it is a well-settled rule of the common law that the stockholders of a corporation cannot divide its property or assets among themselves without first paying the corporate debts. The rules thus announced have been stated very clearly in McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E. 169, 119 Am. St. Rep. 970; O'Bear Jewelry Co. v. Volfer, 106 Ala. 205, 17 South. 525, 28 L. R.

A. 707, 54 Am. St. Rep. 31; Hospes v. Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; Cole v. Iron Co., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; Bartlett v. Drew, 57 N. Y. 587; Morawetz on Corporations, § 791.

The instant case seems to call for a rather full discussion of the so-called "trust-fund" doctrine, and we have perhaps said enough to indicate our view of the matter. We may conclude this branch of the inquiry by quoting the following terse statement from Railroad Co. v. Howard, 7 Wall. 409, 19 L. Ed. 117: "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever's possession it may be transferred, unless it has passed into the hands of a bona fide purchaser." See, also, C., M. & St. P. R. R. v. Third National Bank, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900; Vance v. McNabb Coal & Coke Co., 92 Tenn. 47, 20 S. W. 424.

Going now to facts of the case, it will be observed that the exact point for decision is a narrow one. Plaintiff was a creditor of the Des Moines Cabinet Company, holding an unliquidated demand against it, which was in suit when the cabinet company sold its assets to the undertaking company. The undertaking company acquired practically all of the assets of the cabinet company by purchase, and it issued in payment therefor certain of its shares of stock, not to the cabinet company for proper distribution, but to Hartung individually, who immediately pledged the same as security for his individual debts, leaving nothing from which plaintiff could collect his judgment, which he obtained in due course. The charge of actual fraud—that is, of intent to hinder, delay, and defraud plaintiff in the collection of his claim—has been withdrawn, and reliance is placed upon the general doctrine that plaintiff, under this brief recitation of the facts, is entitled in equity to enforce his judgment against the property of the cabinet company which was received, and is still held, by the undertaking company, on the theory that he has an equitable lien upon this property, or that the facts show a case of legal fraud entitling him to proceed against the property.

We do not recognize the trust-fund doctrine to the extent that it has obtained in some of the courts; but are of opinion that corporate creditors are entitled in equity to the payment of their debts before any distribution of corporate property is made among the stockholders, and recognize the right of a creditor of a corporation to follow its assets or property into the hands of any one who is not a good-faith holder in the ordinary course of business.

We must also enforce our statute which prohibits the diversion of corporate funds and the payment of dividends not earned. So that, in its last analysis, the question here is, Is the undertaking company and its successor in interest such a bona fide purchaser as that it may hold the assets of the cabinet company free from the debts of

that corporation? The answer to this must be in the negative, and for these among other reasons: It issued to Hartung individually whatever of consideration it paid for the assets of the cabinet company, knowing before it finally issued its stock that it was being used by Hartung for his own private ends. It did not buy the property in the usual course of business. On the contrary, it took it over, and issued its own stock in payment therefor, which did not go to the corporation from which it purchased. That it did not take the property free from liability for corporate debts under such circumstances is held by practically all of the cases which we have been able to find or which have been cited by counsel.

In Thompson on Corporations, § 6547, it is said: "Where one corporation transfers all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation. * * * And while the right to follow a trust fund into the hands of a third party depends upon the answer to the inquiry whether such third party took it with knowledge of the trust, the case being one where the trustee who transferred it to him had a power of disposition, yet in such a case as we are supposing, where one corporation transfers all its assets to another, not in the ordinary course of business, the very circumstances of the case imply full knowledge, on the part of the transferee, of all the facts necessary to charge the property in his hands with the debts of the transferror, and the case is still clearer where the corporation receiving the transfer agrees to assume and pay the debts of the corporation making it, in which case, under the principles of equity, and under the modern Codes of Procedure, the creditors of the transferring corporation may maintain a direct action against the transferee corporation upon the contract, as a contract made for their benefit." See, also, Cook on Corporations (3d Ed.) §§ 669, 670; Ex parte Savings Bank, 73 S. C. 393, 53 S. E. 614, 5 L. R. A. (N. S.) 520, and note; Allen v. Church, supra; McIver v. Young Co., 144 N. C. 478, 57 S. E. 169, 119 Am. St. Rep. 970; Couse v. Columbia Co. (N. J. Ch.) 33 Atl. 297; Owen v. Arvis, 26 N. J. Law, 22; Hibernia Ins. Co. v. Transportation Co. (C. C.) 13 Fed. 516; Hurd v. Lumber Co., 167 N. Y. 89, 60 N. E. 327; Cole v. Iron Co., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; Grenell v. Gas Co., 112 Mich. 70, 70 N. W. 413; Berry v. Railroad Co., 52 Kan. 774, 36 Pac. 724, 39 Am. St. Rep. 381; Vance v. Coke Co., 92 Tenn. 47, 20 S. W. 424.

The theory under which these cases proceed is that the purchasing corporation is not a good-faith buyer for value, in that the transaction is an unusual one; and the purchasing company is held to acknowledge that the property it buys is subject to the payment of corporate debts, and the buyer is not a bona fide purchaser for value. See, also, Rogers v. Land Co., 134 N. Y. 197, 32 N. E. 27. There are a very few cases which hold to a contrary doctrine, as, for example, O'Bear

Co. v. Volfer, 106 Ala. 205, 17 South. 525, 28 L. R. A. 707, 54 Am. St. Rep. 31.

For appellant it is argued that the plaintiff should have followed the stock received by Hartung. That proposition is very satisfactorily answered in Hibernia Co. v. St. Louis Co. (C. C.) 13 Fed. 516, where it is said that a creditor in such cases is not required to run the chances of following and recovering the value of the shares of the stock after they are placed upon the market. In McIver v. Young, supra, this proposition is fully considered and determined adversely to appellants' contention. On account of the importance of the questions presented, we have given the case careful consideration, and have come to the conclusion that, while there is no personal liability on the part of the undertaking company as successor in interest to the plaintiff, yet it holds the property received from the cabinet company subject to the payment of plaintiff's claim, and that the trial court was right in establishing a lien against it and ordering a sale on special execution. The decree must be modified to the extent indicated; but, as this is of no material benefit to the defendant, as the property is worth very much more than plaintiff's claim, we think that the modification should be without cost to appellee.

The decree will be modified, and as so modified will stand. Modified and affirmed.[28]

CATLIN v. EAGLE BANK OF NEW HAVEN et al.

(Supreme Court of Errors of Connecticut, 1826. 6 Conn. 233.)

This was a bill in chancery. The Eagle Bank is a corporation, established, by an act of the legislature, in October, 1811, for banking purposes, with the usual powers of such an institution; the charter being, at all times, subject to alteration, amendment or revocation, by the General Assembly. See the charter in the printed statutes, previous to the revision of 1821, book 2, page 65. The plaintiff is a creditor of this corporation to the amount of between 90,000 and 100,000 dollars. The bank, on the 15th September, 1825, failed, and was in fact insolvent. Among its creditors was the Savings Bank of

[28] Compare Hurd v. New York & Commercial Laundry Co., 167 N. Y. 89, 60 N. E. 327 (1901); Vicksburg & Yazoo City Tel. Co. v. Citizens' Tel. Co., 79 Miss. 341, 30 South. 725, 89 Am. St. Rep. 656 (1901); Baker Furniture Company v. Hall, 76 Neb. 88 (on rehearing) 93, 107 N. W. 117, 111 N. W. 129, 113 N. W. 267 (1906).

In Vance & Kirley v. McNabb Coal, etc., Co., 92 Tenn. 47, at page 61, 20 S. W. 424, at page 427 (1892), the court, in speaking of the rights of the creditors of the vendor corporation, said: "Complainants may elect to ratify the transfer of its property by the McNabb Coal & Coke Company and recover the value of the $400,000 of stock from the persons receiving it, or they may avoid the transfer altogether, and pursue the property or its proceeds in the hands of the Consolidated Coal & Iron Company, subject to any rights which have been acquired by subsequent bona fide purchasers for value."

New Haven, a corporation, empowered to receive deposits from individuals, for safe-keeping and management, and obliged to pay the depositors the interest or profits that should accrue. This institution had deposited with the Eagle Bank, at an interest of four per cent. and to be returned on demand, all the money, which it had received, in small sums, from a great multitude of depositors, amounting to between 80,000 and 90,000 dollars. In payment and security of this demand, the directors of the Eagle Bank, after its actual insolvency, mortgaged to the Savings Bank real estate worth about 20,000 dollars paid to Samuel J. Hitchcock, Esq. secretary of the Savings Bank, about 15,000 dollars in money, and assigned to him sundry negotiable promissory notes, to the amount of about 52,000 dollars. The bill prayed, that these conveyances might be set aside, and that all the funds of the Eagle Bank, at the time of its failure, might be equitably distributed among its creditors, in proportion to their respective claims. The case was reserved for the advice of this Court.

HOSMER, C. J.[24] * * * Whether the directors of the corporation, after it has become actually insolvent, can make payment or give security to one of its creditors, and leave another unpaid and without security, is the general question to be determined. It has been contended, in behalf of the plaintiff, with no inconsiderable ingenuity, that the legislature intended to render the corporation at all times a trustee for the creditors. This suggestion is too unfounded, and too destitute of practical importance, to be admitted or discussed. Such a principle, during the solvency of the bank, must be dormant and useless; and neither the charter, nor the nature of the case, furnishes any warrant for the supposition.

In the corporation, so far as regards its right to manage and dispose of its property, has power analogous with that which is vested in an individual, the plaintiff's bill is wholly destitute of merits. An individual debtor, who is actually insolvent, may prefer one creditor to another, unless in certain cases under the bankrupt laws; and to do this, as was said by Lord Kenyon, is neither illegal nor immoral. We have no bankrupt system, to control the acts of the insolvent merchant; and in the absence of all legal liens, he may prefer a creditor, if the act is done in good faith. To discuss the reasons of the rule is unnecessary. It is sufficient to say to those, who are not disposed to unsettle foundations, that it is firmly and uniformly established, both at law and in chancery. Estwick v. Caillaud, 5 Term Rep. 420; Nunn v. Wilsmore, 8 Term Rep. 521; Hopkins v. Gray, 7 Mod. Rep. 139; Meux et al. v. Howell et al., 4 East, 1; McMenomy et al. v. Ferrers, 3 Johns. (N. Y.) 84; Wilkes et al. v. Ferris, 5 Johns. (N. Y.) 344, 4 Am. Dec. 364; Small v. Oudley, 2 P. Wms. 427; Cock v. Goodfellow, 10 Mod. Rep. 489; Phœnix v. Assignees of Ingraham, 5 Johns. (N. Y.) 412, 426, 427; Hendricks v. Robinson, 2 Johns. Ch. 283.

[24] A part of the opinion is omitted.

The same rule is equally applicable to partners; and what is a banking corporation, in the essence, but a partnership authorised by a special act of the legislature? Gow on Part. 234. It is an artificial person; and this denomination is given to it, by reason of its resemblance to a natural person, in respect of its powers, rights and legal duties. It is difficult for me to conceive, where no restraint is interposed, in a charter of incorporation, on what ground, the general authority delegated is subjected to exceptions, or fettered by restrictions, from which an individual and a mercantile company, are free. And this difficulty is much increased, as no case intimating this diversity between corporations and individuals, has been cited, nor can be found, by my utmost researches. Where no legal lien has been obtained, it is a reasonable supposition, that the relation of creditor and debtor, must, in all cases, infer the same consequences; and that where the same mischief exists, there is the same law. The cases of an individual and of a corporation, in the matter under discussion, it appears to me, are not merely analogous, but identical; and I discern no reason, for the slightest difference between them. There exists no doubt, that there have been many instances of actually insolvent corporations, where certain creditors have been preferred to others; and the perfect silence until now, on the subject of this fancied diversity, is powerful to show what has been the universal opinion.

It however has been insisted for the plaintiff, that on the actual insolvency of the bank, the corporation were the trustees of the creditors; and if this be true, the latter become the cestuy que trusts of all the corporate estate. The consequence on this supposition, would be, that all persons coming into possession of the bank property, with notice of the trust, must be considered as trustees. Daniels v. Davison, 16 Ves. Jun. 249; Moore v. Butler, 1 Scho. & Lef. 262. No express trust was created, on the happening of the bank's insolvency; but the charter on every fair principle of construction, conferred on the corporation the entire control of its property, as well after as before this event.

It however has been imagined, that the trusts arose by operation of law. I enquire of what law? No principle, or case, or analogy has been referred to, that supports the proposition; nor am I capable of conceiving any. The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the trustee of his creditors. The relation of creditor and debtor exists in both cases; but from this relation no trust arises. Undoubtedly, in all cases of actual insolvency, the creditor would derive security from this doctrine; and often great losses might be prevented. But the interest of the insolvent person is not to be entirely disregarded. His creditor has voluntarily become such, with full knowledge, that his security must very much depend on the integrity of his debtor. With open eyes he has given credit; and the public charter of the corporation has instructed him in all the powers and rights of the corporation.

Now, it would be a very harsh and inequitable doctrine, but on the plaintiff's claim, it is inevitable, that the moment a banking institution is unable to pay all its debts, the directors of the bank may not issue a bank bill, dispose of bank property, make payment of a single debt, or perform one bank operation. May not an individual, or mercantile company, under the same circumstances, proceed in the usual train of business? This is not disputed. It is the law of chancery, that they may prefer one creditor to another; and this, on a principle of analogy, refutes, entirely, the supposition of a trust in this case. The novelty and unsoundness of the plaintiff's claim are such, that it is difficult to support, or even to oppose it, without taking leave of every established principle, and beating the air. That the directors of the Eagle Bank are trustees, I admit; but they are the trustees of the stockholders. The stockholders are the cestuy que trusts, and the charge of breach of trust must come from them. Attorney General v. Utica Insurance Company, 2 Johns. Ch. 371, 385. * * *

From this discussion it is unquestionable, that the jurisdiction of chancery does not extend to the disposal of the corporation estate or funds of the Eagle Bank. More time has been occupied in the examination of the principle, than perhaps can be justified, as it has no application to the case before us. The bank has, in no proper sense, misapplied its funds. It has done what it had a right to do, and what is uncontrolable by this Court; that is, it has preferred to pay and secure the claim of what was considered a meritorious creditor. Of its creditors, the corporation was not a trustee; they had no lien upon its funds; and no case is made out, entitling the plaintiff to relief, or showing any jurisdiction exercisable by this Court.

The plaintiff's bill must be dismissed.

BRAINARD and LANMAN, JJ., were of the same opinion. PETERS, J., being interested in the question, and DAGGETT, J., having been of counsel in the cause, gave no opinion.

Bill to be dismissed.[25]

BALLIN et al. v. MERCHANTS' EXCH. BANK et al.

BALLIN et al. v. MOSSBACHER et al.

(Supreme Court of Wisconsin, 1895. 89 Wis. 278, 61 N. W. 1118, 27 L. R. A. 357, 46 Am. St. Rep. 834.)

WINSLOW, J.[26] A creditor of an insolvent corporation, knowing its insolvency, attaches its property, without collusion with the officers of the corporation. Afterwards, and while the attached property is in the hands of the officer, another creditor obtains judgment, and com-

[25] Compare Rouse v. Merchants' National Bank, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644 (1889).

[26] Facts sufficiently stated in the opinion, a part of which is omitted.

mences an action, under section 3216, Rev. St., to close up its affairs and sequestrate its property, making the attaching creditor and the officer parties to the suit. Can the attaching creditor be deprived of his lien upon the property attached, and be compelled to share equally with all other creditors in the property of the corporation? This is the single question which is sharply presented in this case.

The complaint charged a fraudulent and collusive attachment by the first class of creditors; and a preliminary order, based on this complaint, requiring the sheriff to surrender the attached property to the receiver, was affirmed by this court. Ballin v. Loeb, 78 Wis. 404, 47 N. W. 516, 10 L. R. A. 742. The ultimate rights of the attaching creditors were not determined on that appeal, however; but it was held that they must come into this action for any share of the proceeds of the property, or for any remedy against it. The effect of that decision was simply to hold that the receiver was entitled to the possession of the property for the purpose of winding up the affairs of the corporation, and that all claims of liens upon the property must be litigated in this action. On the trial the plaintiffs abandoned all charges of collusion and fraud, and rested solely on the ground of the corporation being insolvent, and that the attaching creditors had knowledge of such insolvency when they attached. And thus the question presents itself, as first above stated.

Upon this question, the plaintiffs rest their case upon the so-called "trust-fund doctrine," and take a broad ground that, from the moment a trading corporation becomes insolvent, its assets become a trust fund for the benefit of its creditors, and that no creditor, knowing of its insolvency, can obtain a valid lien by attachment of any of the property; and they argue that this doctrine has received the express or implied sanction of this court. It must be admitted that there are authorities in other jurisdictions holding this doctrine to its full extent, but it certainly has not yet been held by this court that a creditor of an insolvent corporation may not obtain a valid lien by attaching its property in a bona fide attempt to collect his debt.

The cases which are principally relied upon by the plaintiffs as having sanctioned the trust-fund doctrine, in this court, are Bank v. Knowles, 67 Wis. 373, 28 N. W. 225; Haywood v. Lumber Co., 64 Wis. 639, 26 N. W. 184; Ballin v. Loeb, 78 Wis. 404, 47 N. W. 516, 10 L. R. A. 742; Ford v. Bank, 87 Wis. 363, 58 N. W. 766. A brief review of the questions actually decided in these cases will be useful. In Haywood v. Lumber Co., it was held that directors of an insolvent corporation could not lawfully convey or mortgage the corporate property to themselves, to secure their own claims against the corporation. In Bank v. Knowles, it was held that a trust deed of an insolvent manufacturing corporation, to secure bonds given to certain creditors, some of whom were directors of the corporation, was void, because made with the intent to hinder, delay, and defraud other creditors, and because it had the effect of a fraudulent preference of certain credi-

tors, to the exclusion of all others. In Ballin v. Loeb, it was held, as previously stated in this opinion, that an attaching creditor of an insolvent corporation, whose attachment was charged to have been fraudulent and collusive, must come into this action, and assert his rights to a lien upon the attached property. The same, in principle, was the holding in Ford v. Bank. In the last-named case, it was charged that judgments by confession had been collusively and fraudulently obtained, and levies made thereunder; and it was held that the property levied upon must go into the hands of the receiver, and that a creditor must seek and enforce his lien, if any, in the sequestration action.

On the other hand, in Trust Co. v. Geilfuss, 86 Wis. 612, 57 N. W. 349, it was distinctly held that where an insolvent corporation had made a valid assignment for the benefit of its creditors, under the statute, such assignment was not superseded or affected by the appointment of a receiver in an action against the corporation, under section 3216, Rev. St. We believe the foregoing is a fair statement of the questions actually presented and decided in the cases named, and from this statement it seems very certain that the question here presented has not been foreclosed or decided by this court.

The intangible body known to the law as a "corporation" must necessarily act by its agents, and these agents are its managing officers. An agent who is handling the funds or property of his principal acts in a trust capacity, and is in a sense a trustee. The managing officers of the corporation are therefore at all times trustees for the corporation and its stockholders. It may also be correctly said that the corporate property in the hands of the receiver is a trust fund for the benefit of creditors, in the sense that it is to be applied to the payment of the corporate creditors before it can be applied for the use or benefit of the stockholders. The plaintiff's contention is broader than this, and is to the effect that when a corporation in fact becomes insolvent, though still doing business, the managing directors thereof become "trustees" of the corporate property, in the full and complete sense of the term, and can make no disposition of such property to one creditor to the exclusion of others, nor can a creditor, acting in good faith, acquire a valid lien upon the corporate property by attachment.

As to the first branch of this proposition, to the effect that the directors cannot convey or mortgage the corporate property to a creditor, we are not now concerned, because that question does not arise in this case. The sole question here is whether a diligent creditor, knowing of the corporate insolvency, and bringing his attachment proceedings in an honest effort to collect his debt, can acquire a valid lien upon the corporate property, which will be protected upon a subsequent sequestration action. Upon this question we have no hesitation in holding that such a creditor will acquire a valid lien. To hold otherwise is to hold, in effect, that a debt cannot be collected, by ordinary processes of law, from an insolvent corporation; that the corporation

may buy and sell, make contracts, and transact its ordinary business, but that it enjoys a practical immunity from all the laws for the enforcement of its obligations, until some creditor sees fit to commence an action to wind up its affairs. In other words, it may buy property, but cannot be compelled, by ordinary processes of law, to pay for it; it may contract, but cannot be compelled to perform its contract; it is provided with a shield, which becomes, to all intents and purposes, a sword, in its hands, against the diligent creditor.

Certainly, no such immunity from the ordinary laws governing the rights of creditors is given it by statute. On the contrary, the statute provides (Rev. St. § 2729) that any creditor may proceed by attachment against the property of his debtor, "whether a natural person or corporation"; and in vain do we look for any exception in the statute law, such as is claimed here. We shall not attempt to ingraft any such exception on the statute by decision. We see no good reason why a trading corporation, so long, at least, as it deals with others in its ordinary course of business, should not be subject to the ordinary remedies provided by the law for the collection of debts. Its property is certainly not trust property, in the sense that it cannot be relied on by its creditors to respond to the ordinary processes of the law, sued out in good faith. The following authorities fully bear out these views, and we cite them as sustaining the point now decided, without affirming or denying their correctness in other respects: White, etc., Mfg. Co. v. Henry B. Pettes Importing Co. (C. C.) 30 Fed. 864; Hospes v. Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; Fogg v. Blair, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. Ed. 721; Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Roseboom v. Whittaker, 132 Ill. 81, 23 N. E. 339.

From these views, it follows that the first class of creditors were, upon the facts before the court, entitled to have their attachment liens adjudged valid, and to be first paid out of the proceeds of the attached property in the hands of the receiver, and hence that the order of the superior court must be reversed. * * *

So much of the order appealed from as provides for an equal distribution among creditors of all property in the hands of the receiver, and denies any preference, and enjoins further proceedings by the defendants, is reversed, with costs, upon both appeals, and the remainder of the order is affirmed, and the action is remanded for further proceedings in accordance with law.[37]

[37] **Accord:** Breene v. Merchants' & Mechanics' Bank, 11 Colo. 97, 17 Pac. 280 (1887): Farwell Co. v. Sweetzer et al., 10 Colo. App. 421, 51 Pac. 1012 (1897).

See Marr v. Bank of West Tennessee, 4 Cold. (Tenn.) 471 (1867); Miers & Caulson v. Zanesville & Mayville Turnpike Co., 13 Ohio, 197 (1844).

EWING v. COMPOSITE BRAKE SHOE CO.

(Supreme Judicial Court of Massachusetts, 1897. 169 Mass. 72, 47 N. E. 241.)

LATHROP, J. The plaintiff was a creditor of a Maine corporation to the amount of $787. This corporation ceased to do business, and the stockholders, together with at least one other person, formed a new corporation, with a different name, under the laws of Massachusetts. The new corporation is the defendant in this case. It took all of the assets of the old corporation except its books, but it did not assume to pay all of the debts of the old corporation, although there was evidence that one Whitcomb, who was the manager of both of the corporations, told the plaintiff that the new company would be liable for the debts of the old. It is obvious, however, that where a new corporation is formed the creditors of the old corporation do not, without something further being done, become creditors of the new corporation. They have an equitable right to follow the assets of the old corporation; but they cannot maintain an action at law against the new corporation, for there is no privity of contract. To render the new corporation liable, there must be a new contract made, such as will amount to a novation. See Mor. Priv. Corp. (2d Ed.) § 808 et seq.

If a new contract is made between a creditor of the old corporation and the new corporation, the latter is liable only on the new contract. In the case at bar, according to the plaintiff's testimony, the new contract which he made with the manager was that he should receive $200 in cash and five shares of the capital stock of the new corporation at the par value of $100 a share in full payment of his claim of $787. He received the money and a certificate of five shares of the capital stock. He now seeks to rescind the new agreement, on the ground that the capital stock of the new corporation was not fully paid in before it began business. But, even if this is so, he cannot hold the new corporation for the original debt, as it never contracted to pay it, except in the manner in which the agreement has been performed.

There is an independent ground, which leads to the same result. The plaintiff has tendered only the five shares of stock, and has not offered to return the $200 which he received. If a person enters into a contract, and afterwards seeks to avoid the effect of the contract on any ground that will entitle him to rescind it, he must first restore what he has received. Drohan v. Railway Co., 162 Mass. 435, 38 N. E. 1116; Moore v. Association, 165 Mass. 517, 43 N. E. 298.

Exceptions overruled.[28]

[28] Compare: In re Provincial Life Assurance Society, L. R. 9 Eq. Cas. 306 (1870); In re Family Endowment Society, L. R. 5 Ch. App. 118 (1870); In re European Assurance Society, L. R. 1 Ch. Div. 307 (1875).

SECTION 3.—CREDITORS' RIGHTS AS AFFECTED BY MERGER OR CONSOLIDATION

ZIEMER v. C. G. BRETTING MFG. CO.

(Supreme Court of Wisconsin, 1911. 147 Wis. 252, 133 N. W. 139.)

TIMLIN, J. The former decision of this case is reported in 142 Wis. 224, 125 N. W. 318, where a judgment in favor of the plaintiff was reversed on the ground that the evidence failed to show that the plaintiff at the time of the injury was in the employ of the defendant corporation. The case was retried, and at the close of the testimony the circuit court directed a verdict for the defendant, for the reason that the plaintiff was not in the employment of the defendant at the time of the injury. The plaintiff appealed to this court, whereupon the parties entered into the following stipulation: "It is hereby stipulated by and between the above-named parties that the judgment herein shall be affirmed, unless this court shall find that there was evidence in the case upon which the jury could have found that the plaintiff was in the employ of the defendant at the time he was injured, or that the defendant is hereby estopped from denying that the plaintiff was then in its employ, or that the defendant assumed liability for such injury."

The appeal, therefore, involves an examination of the evidence. Evidence was offered, which did not appear when the case was formerly before this court. It appeared that C. G. Bretting carried on a foundry business, under the name of the C. G. Bretting Manufacturing Company, at Ashland, Wis., prior to his death, which occurred in A. D. 1904. Jane Bretting, his widow, was then appointed administratrix, and ordered to close up the contracts and business on hand, and she continued the business under the same name. On January 21, 1907, she filed her final account as administratrix. On March 28, 1907, the inheritance tax was fixed. On April 2, 1907, she filed a supplemental or additional account as administratrix. C. G. Bretting left surviving him his widow and three sons, Ralph Bretting, William Henry Bretting, and Henry L. Bretting. These four may be said to have owned the foundry plant and business as widow and heirs of C. G. Bretting, deceased. Ralph C., Henry L., and William H. Bretting were under 21 years of age, and Jane Bretting was their guardian. On or about March 16, 1907, Jane Bretting, Sam Wheeler, and C. A. Lamoreaux executed articles of incorporation of the C. G. Bretting Manufacturing Company, and caused the same to be duly filed with the Secretary of State and recorded with the register of deeds of Ashland county. This corporation was empowered by such

articles to carry on a similar business to that carried on by the natural persons aforesaid, under the same name, and at the same place.

The plaintiff was employed as a molder by the C. G. Bretting Manufacturing Company in April, 1907, and on June 19, 1907, while in that employment, was injured by reason of alleged defective appliances. The signers of the said articles of incorporation met on July 15, 1907, and received the subscriptions of Jane Bretting, Ralph Bretting, Sam Wheeler, and C. A. Lamoreaux to the capital stock of said corporation, and turned over the affairs of the corporation to the stockholders. The latter immediately and on the same day convened for the purpose of electing a board of directors and the transaction of other business. Among other things it was resolved "that the matter of the purchase of the C. G. Bretting manufacturing plant as heretofore conducted, consisting of real estate, buildings, machinery, and all personal property and accounts, as shown by the statement and schedule this day filed with the secretary of this company, be and the same is hereby referred to the board of directors, and the said board is hereby empowered, directed, and authorized to purchase the said plant as of date of April 1, 1907, for the sum of $40,000, and to issue in consideration therefor shares of the general stock of this corporation at par, not to exceed the sum of $40,000; it being understood that the said plant is owned by Jane Bretting, Ralph C. Bretting, William Howard Bretting, and Henry Lyman Bretting, one-quarter each, and that the stock of said corporation in payment therefor shall be issued to said owners of equal amount—i. e., $10,000 of stock at par value to each of said owners above named."

The schedule showed block 3, Commercial addition, Ashland, Wis., with the following buildings thereon: Foundry, blacksmith shop, boiler shop, machine shop, wood shop, pattern house, pumphouse; also a dwelling house on certain described lots, and certain machinery, tools, and fixtures, with stock on hand and other personal property, and a list of accounts receivable. On September 12, 1907, Jane Bretting and her three sons executed a transfer of this property to the corporation. The corporation used the same books of account as its predecessor, continuing the same accounts, without rest or break. The stockholders were the same persons theretofore interested in the manufacturing company, except C. A. Lamoreaux, who took one share, apparently for the purpose of qualifying him as director, and Sam Wheeler, who took five shares, and paid $500 therefor, and later bought another five shares. Checks were signed "Jane Bretting Administratrix," or simply "Jane Bretting." One of the Brettings testified that the corporation did not assume the liabilities of its predecessor in business; but this was merely his conclusion of law upon the facts. The relations of Jane Bretting and her three sons to one another and to this property cannot in strictness be said to be those of copartners. But there was a decided analogy in respect to ownership and obligation. The evidence fairly tends to prove that on and after March 15, 1907, the ad-

ministratrix and her children intended to convey this business and property to the corporation in exchange for shares of its stock as soon as they conveniently could do so, the transfer to take place as of April 1, 1907. They proceeded by easy stages to accomplish this as above recited. There is no fraud in the transaction. The question is whether the corporation is liable to an employé, injured in consequence of a defective appliance on June 19, 1907. The law requires notice of such injury to be served within one year from the date of injury, and in October, 1907, the appellant served such notice on the corporation, by serving it on Jane Bretting, an officer thereof.

There is a line of authority which may be fairly said to hold that where copartners or other joint owners of a solvent going business transform themselves into a corporation, to which the joint property is transferred in exchange for shares of stock, there must, in order to bind the new corporation for the liabilities of the former partnership, be an express assumption by the corporation of such liabilities. 2 Cook, Corporations, § 673, p. 2041; Hart Pioneer Nurseries v. Coryell, 8 Kan. App. 496, 55 Pac. 514; Austin v. Tecumseh Nat. Bank, 49 Neb. 412, 68 N. W. 628, 35 L. R. A. 444, 59 Am. St. Rep. 543.

There are also cases which hold that no such express agreement need be shown, but seem to go upon the presumption that such liabilities are assumed under these circumstances. Du Vivier & Co. v. Gallice, 149 Fed. 118, 80 C. C. A. 556; Modern Dairy, etc., Co. v. Blanke, etc., Supply Co. (Tex. Civ. App.) 116 S. W. 153; Haslett v. Wotherspoon, 1 Strob. Eq. (S. C.) 209; Andres v. Morgan, 62 Ohio St. 236, 56 N. E. 875, 78 Am. St. Rep. 712; Texas Loan Agency v. Hunter, 13 Tex. Civ. App. 402, 35 S. W. 399; York Mfg. Co. v. Brewster, 174 Fed. 566, 98 C. C. A. 348.

A third line of cases holds that the assumption of liabilities may be express or implied, and the latter rule has been established for this court in Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84. See, also, Hall v. Herter Brothers, 83 Hun, 19, 31 N. Y. Supp. 692; Id., 90 Hun, 280, 35 N. Y. Supp. 769, affirmed 157 N. Y. 694, 51 N. E. 1091. In Schufeldt v. Smith, 139 Mo. 367, 40 S. W. 887, a partnership of three members converted themselves into a corporation. Later the corporation made a deed of trust, preferring certain creditors of the former partnership. In a suit by creditors of the corporation to have this deed set aside, the deed was upheld, but upon the ground that the evidence established an agreement by the corporation to take the firm property and assume its liabilities. See, also, 3 Thompson Corp. (2d. Ed.) ch. 83, §§ 2345, 2359. This agreement on the part of the corporation may be proven, like any other fact, by any competent evidence which will establish either an express or an implied valid agreement to assume the liabilities. Pratt v. Oshkosh and Hall v. Herter Brothers, supra.

The evidence of assumption in the instant case is as follows: (1) The identity in name; (2) the almost complete identity of interest;

(3) the continuation of the same business at the same place; (4) the identity of property; (5) the use of the old books, without break or rest in the accounts; and (6) the resolution to take the property of the former associates as of date of April 1st. This last is very significant. In order to take the property as of April 1st, the corporation would necessarily acquire all increase or increment accruing after that date, and be subject to all diminution or loss occurring after that date in the ordinary vicissitudes of business. If the copartners sold goods or merchandise after April 1st on credit, the account, including the profit on the transaction, would go to the corporation. If, by reason of breach of warranty on this sale, a liability accrued to the purchaser, the corporation would be chargeable with this liability. No other reasonable effect could be given to the resolution to take the property as of date of April 1st. In Chicago, Racine & Milwaukee Line v. Wilmanns et al., 141 Wis. 289, 124 N. W. 261, the receivers on December 16, 1908, sold and transferred certain accounts "as of June 17, 1908." It was held that this carried to the purchaser moneys collected on the accounts by these receivers between June 17 and December 16, 1908.

The form of liability to the plaintiff, if there is any such liability, is not material. If there is such liability, it was a loss of the partnership incident to the operation of the business, and incurred after April 1st and before the actual transfer to the corporation was consummated. A business loss or liability of this kind cannot, with reference to the interpretation of the words "as of date of April 1st," be logically distinguished from any other business losses or liabilities occurring after April 1st. The design to take over and continue the old business is apparent, and the expression "as of date of April 1st" must be given some significance, although the writing in which it occurs describes only tangible property. If one of these buildings or one of these machines was destroyed by accidental fire after April 1st, would not the loss fall on the corporation? The expression is nearly the equivalent of the old Latin, "nunc pro tunc."

The plaintiff was not in the employment of the corporation at the time he was injured, but was in the employment of the precedent managers and owners of the business; and, assuming that there was an outstanding liability of such manager and owners to the plaintiff, incurred in the operation of this business and accruing on June 19, 1908, when the corporation took over this property as of April 1, 1908, and continued the same account books under the same name, at the same place, for the purpose of continuing the same business, it assumed by this form of resolution the liability to the plaintiff if any such liability existed.

It follows that the judgment of the circuit court must be reversed, and the cause remanded for a new trial. Judgment reversed, and the cause remanded for a new trial.

FOGG v. BLAIR.

(Supreme Court of the United States, 1890. 133 U. S. 534, 10 Sup. Ct. 338, 33 L. Ed. 721.)

In 1870 the plaintiff, Fogg, had an adjusted claim against the St. Louis & Keokuk Railroad Company for services and advances, amounting to $9,547.75. In 1873, the St. Louis & Keokuk Railroad Company sold and transferred its entire property to the St. Louis, Hannibal & Keokuk Railroad Company, organized in 1872. In consideration of the transfer the latter company assumed the obligations of the former. In 1872 and 1877 deeds of trust were issued to Blair as trustee to secure a bond issue, the proceeds of which were used in the construction and extension of the road. In February, 1884, the trustee began proceedings to foreclose the trust deed on default in interest by the mortgagor.

In 1882 Fogg obtained judgment on his claims against the St. Louis & Keokuk Railroad Company. After a nulla bona return on an execution issued under this judgment, Fogg obtained a decree in equity, holding both companies jointly liable on the judgment. The plaintiff filed a cross-bill in the foreclosure proceedings under the trust deed, to which he was a party, for the purpose of obtaining priority for his judgment over the demands of the trustee representing the bond holders. Appeal from a decree holding that the plaintiff's judgment is not entitled to priority.[29]

FIELD, J.[30] The claim of the appellant that his demand, which passed into judgment May 5, 1884, against both the St. Louis & Keokuk Railroad Company, and the St. Louis, Hannibal & Keokuk Railroad Company, is entitled to payment prior to the bonds secured by the mortgage or trust-deed, would seem to be answered by the dates of the judgment and mortgage, respectively. The judgment was not rendered against the original company until October 3, 1882, and not against both companies until May 5, 1884. The mortgage was executed on the 1st day of August, 1877, five years before the first judgment, and nearly seven years before the second.

It does not appear in the record precisely what the services were which were rendered by the complainant, or for what purposes advances by him were made. This is not material, however, as no claim is made, because of the nature of those services and advances, to a lien on the property of the original company, under the statute of the state. It does not appear that any proceedings were taken to establish such a lien. Independently of that statute, there was no lien upon any property of the railroad company for the demand of the complainant. It stood like any ordinary debt against a corporation, which could only

[29] Statement of facts substituted.

[30] A part of the opinion is omitted.

be enforced by legal proceedings establishing its validity and amount by judicial determination, and then by process upon the judgment obtained, in subordination to any previously existing liens upon the property.

In some states,—and this is the case in Missouri,—statutes make judgments of their courts liens upon the real property of the judgment debtor, and the same rule applies in such states to judgments in the courts of the United States. But in all cases the judgments become liens only from the time they are rendered, or notice thereof is filed in the register's office of the county where the property is situated. They are subordinate to any prior mortgage upon the property. This doctrine is so familiar that it is surprising that any other can be supposed to exist. The property of a railroad company is not held under any such trust to apply it to the payment of its debts as to restrict its use for any other lawful purpose, it matters not how meritorious the demand of the creditor may be. He must obtain a lien upon the property of the company, or security in some other form, or he will have to take his chances with all other creditors to obtain payment in the ordinary course of legal proceedings for the collection of debts. * * *

We do not attach any weight to the objection that the transfer by the old company of its entire property to the new company was illegal and ultra vires, and therefore to be disregarded. However such a transfer might be considered in a suit to set it aside, the objection does not lie in the mouth of the appellant, for he has proceeded against the new company, and obtained, upon the assumed validity of such transfer, a decree that it pay his judgment, which is founded upon a demand that the company agreed to assume as part of the consideration of the transfer.

There is no evidence in the record before us that the parties who took the bonds issued by the St. Louis, Hannibal & Keokuk Railroad Company had any notice, actual or constructive, of the demand of the complainant. But, if they had, it would not have affected their rights. That demand was not then reduced to judgment, and created no lien upon the property of the company, nor any restriction upon the company's right to use it for any lawful purpose. The bonds were given to raise the necessary funds to complete the road of the company, and the mortgage was executed to secure their payment. They were negotiable instruments, and in the hands of the purchasers cannot be impeached for any neglect of the company issuing them to pay the demands of other creditors. We are unable to perceive any ground upon which their priority over the claim of the appellant can be in any way impaired.

We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be ap-

propriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence.

The cases of Curran v. State, 15 How. 304, 307, 14 L. Ed. 705, and Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944, give no countenance to anything of the kind. Judgment affirmed.[81]

INDIANAPOLIS, C. & L. R. CO. v. JONES.

(Supreme Court of Indiana, 1868. 29 Ind. 465, 95 Am. Dec. 654.)

Appeal from the Decatur Common Pleas.

FRAZER, J. This case is here solely upon a question of the sufficiency of the evidence, It was a suit to recover the value of a steer, alleged to have been killed by defendant's cars, in April, 1865, in Decatur county, the railroad not being fenced. The answer was the general denial. The issue was found for the plaintiff, and his damages assessed at $100. The question made is without any substantial merit, being purely technical. It must, however, be determined according to law. It was the cars of the Indianapolis & Cincinnati Railroad Company that killed the steer, since which time that company's road has been consolidated with the road of the Lafayette & Indianapolis Railroad Company, under the laws of this State, and the corporation thus formed is the appellant, the Indianapolis, Cincinnati & Lafayette Railroad Company.

It is disputed that the consolidated company, the appellant, is liable for the value of the steer, and Evansville v. Evansville Gas Light Co., 26 Ind. 447, is relied on as an authority to sustain the proposition. The case seems to us to have no bearing whatever upon the question.

By the consolidation, both of the old companies ceased to exist separately, and all their effects and franchises were vested in the new company. The two corporations became merged in one. We cannot imagine how the Indianapolis & Cincinnati Railroad Company could afterwards be sued. Upon whom would process be served? It ceased to have any officers or agents. It ceased to be a separate legal entity. Instead of two, there was now but one corporation, made up of the mingled elements of the two pre-existing companies, so combined and merged that neither could be separately identified or brought into court. But what are the rights of creditors and persons upon whom torts have been committed by the vanished corporations? A

[81] Compare Montgomery & West Point R. Co. v. Branch Sons & Co., 59 Ala. 139 (1877).

dead man may have an administrator to represent his estate and answer to suits, but a corporation lawfully disappearing thus, has no estate to be administered. Its assets have lawfully vested in the new consolidated corporation. Must lawful claims be lost, then?

That result cannot follow. The legislature has chosen to make no provision upon the subject, and the industry of counsel, as well as our own examination of the books, has failed to discover any direct authority upon the question before us. The analogies of the law, too, afford little aid in its solution. We regret to be compelled to decide it without a more thorough argument. Giving it, however, the best consideration of which we are capable under the circumstances, we have reached the conclusion that, for the purposes of answering for the liabilities of the constituent corporations, the consolidated company should be deemed to be merely the same as each of its constituents, their existence continued in it, under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company in the same way as if no change had occurred in its organization or name. This doctrine seems to spring from the necessities of justice, and, so far as we are able to foresee, cannot result in wrong or embarrassment. To avoid variance in proof, the complaint should, in this case, have averred the facts, which it did not; but it seems to us that it could have been cured by amendment on the trial, and that the variance is therefore not available to the appellant here.

The judgment is affirmed, with ten per cent. damages and costs.

LANGHORNE v. RICHMOND RY. CO. et al.

(Supreme Court of Appeals of Virginia, 1895. 91 Va. 369, 22 S. E. 159.)

The plaintiff brought an action of trespass on the case against the Richmond Railway Company, known also as the Richmond City Railway Company, and the Richmond Railway & Electric Company, for an injury done to him by the first-named company. The declaration was demurred to on the ground that there is a misjoinder of the causes of action, of the form of action, and of the parties. Demurrer sustained. Appeal.[82]

BUCHANAN, J.[83] * * * The declaration states a good cause of action against the Richmond Railway Company for the injury complained of. It alleges that the Richmond City Railway Company is one and the same corporation as the Richmond Railway Company. It also alleges the authority of the Richmond City Railway Company to consolidate with the Richmond Railway & Electric Company, and that a

[82] Statement of facts abridged.

[83] A part of the opinion is omitted.

consolidation has been made by which the last-named company acquired all the works, property, and franchises of the Richmond City Railway Company, and assumed all its liabilities. Such a consolidation as is alleged in the declaration not only renders the property and works of the old company, which pass to the company with which it is consolidated, subject to the liabilities of the old company, but also makes the new or surviving company responsible for them. Where two railroad companies unite or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges and is subject to all the restrictions and liabilities of those out of which it is created. Tomlinson v. Branch, 15 Wall. 460, 21 L. Ed. 189; Tennessee v. Whitworth, 117 U. S. 139–147, 6 Sup. Ct. 649, 29 L. Ed. 830. The corporation which is created by such consolidation, or the surviving corporation, where another or others are merged into it or consolidated with it, is ordinarily deemed the same as each of the corporations which formed it for the purpose of answering for the liabilities of the old corporation, and may be sued under its new name or under the name of the surviving company for their debts as if no change had been made in the name or in the organization of the original corporations. Jones, Ry. § 415; 1 Thomp. Corp. §§ 372, 373, 395; 1 Beach, Priv. Corp. §§ 343, 344; 2 Mor. Priv. Corp. § 955; Tayl. Priv. Corp. § 666; 4 Am. & Eng. Enc. Law, 272n.

There has been some question whether the consolidated company could be sued in an action at law for the liabilities of the companies composing it, or whether the proceeding must be in equity; but the better view seems to be that, when a consolidation has been authorized and made, it confers all the rights, property, and franchises of the old company upon the new or consolidated company, and subjects it to all the liabilities of the old companies; and an action at law may be brought against the new or consolidated company for the debts or torts of the old companies. The question is not whether the consolidation compels a creditor to accept the defendant corporation as a new debtor against his will, or a person who has been injured to resort to a stranger for satisfaction, but whether it empowers the creditor or the person injured to resort, if he desires to do so, in the first instance, to the corporation which by the terms of the consolidation is made liable to him.

The privity, some cases say, necessary to support this action, is created by the statute authorizing the consolidation and the purchase and conveyance under it. Other authorities place the right to bring such action on the ground that the effect of the consolidation is, as to the liabilities of the old company, not to dissolve the corporation which is the immediate debtor, but to continue its existence in the consolidated corporation. 1 Thomp. Corp. §§ 372, 395; 1 Beach, Priv. Corp. § 344; 2 Mor. Priv. Corp. § 955; Jones, Ry. §§ 418, 419; Tayl. Priv. Corp. § 666; New Bedford R. Co. v. Old Colony R. Co., 120 Mass.

397; Railroad Co. v. Skidmore, 69 Ill. 566; Arbuckle v. Railroad Co., 81 Ill. 429; Railroad Co. v. Boring, 51 Ga. 582; Thompson v. Abbott, 61 Mo. 176; Railroad Co. v. Shirley, 54 Tex. 125; Railroad Co. v. Fryer, 56 Tex. 609; Warren v. Railroad Co., 49 Ala. 582; Field, Corp. § 395; State v. Baltimore & L. R. Co., 77 Md. 489, 26 Atl. 865; Berry v. Railroad Co., 52 Kan. 774, 36 Pac. 724, 39 Am. St. Rep. 381.

Since, by authority of law and the act of the parties, the consolidated corporations are molded into one with none of their rights impaired, and none of their responsibilities lessened, there is no good reason why the same proceedings may not be had against the new corporation as might have been had against the old to compel payment of liabilities. It avoids circuity of action. It allows the party with whom the contract was made or to whom the injury was done to proceed directly against the corporation which, by virtue of the consolidation proceedings, is made liable for it.

In this case, as the plaintiff had instituted his action to recover damages from the consolidated corporation for the injury alleged to have been done him by the corporation consolidated with it, it was necessary for him to allege generally the authority of the old companies to consolidate, and the fact that they had consolidated, and under what name, in order to show the liability of the new or consolidated corporation for the injury sued for. 1 Thomp. Corp. § 406.

The declaration states a good cause of action, not only against the Richmond Railway Company, known also as the Richmond City Railway Company, but also against the Richmond Railway & Electric Company. To this there can be no objection, as it was necessary to state a good cause of action against both the Richmond City Railway Company and the Richmond Railway & Electric Company; otherwise there could be no recovery against the last-named company, since its liability depends upon the liability of the Richmond City Railway Company. But the defect in the declaration is in joining them as defendants. They are not jointly liable. One is liable for committing the alleged injury; the other is liable by reason of the consolidation proceedings. The plaintiff has the right to sue either for the injury alleged to have been done, but has no right to sue both in the same action at law. If an action at law be brought against two or more persons, it must appear from the declaration that the contract or tort upon which it is brought is a joint contract or a joint tort. 2 Tuck. 208, 214, 226. It was held in Sanders v. Clason, 13 Minn. 379 (Gil. 352), that "a cause of action against a defendant for the value of goods sold and delivered and a cause of action against a third person on the promise to such defendant to pay said debt to the plaintiff are improperly joined, and the complaint is bad on demurrer."

In this case it was necessary to state a good cause of action against the Richmond City Railway Company in order to state a good case against the Richmond Railway & Electric Company. If the plaintiff

had only instituted his action against the last-named company, there would have been no misjoinder of causes of action; but as he made both corporations parties to the action, and the declaration states a good cause of action against each, there is a misjoinder of causes of action and of parties.

On these grounds, it was proper for the trial court to sustain the demurrer to the declaration, and its judgment must be affirmed.

Affirmed.[84]

SECTION 4.—CREDITORS' RIGHTS AS AFFECTED BY DISSOLUTION

GREELEY v. SMITH et al.

(Circuit Court of the United States, District of Maine, 1845. 3 Story, 657, Fed. Cas. No. 5,748.)

This was an action at law by Philip Greeley and others against Joseph Smith and the Exchange Bank.

This case was formerly before the court upon a plea to the jurisdiction, which having been overruled, Rand for the defendants suggested, that by an act of the legislature of Maine, passed on the 7th of ———, 1840, the surrender of its charter by the Exchange Bank (one of the defendants,) was accepted, and thereupon it was declared, "that the same shall terminate when the act shall take effect;" and it was further enacted, that "the bank shall continue its corporate capacity during the term of two years from the time this act shall take effect, for the sole purpose of collecting the debts due to the corporation, selling and conveying the property, and estate thereof, and shall remain liable for the payment of all debts due from the same, and shall be capable of prosecuting and defending suits at law, and for choosing directors for the purposes aforesaid, and for closing its concerns." The act took effect from and after the sixth of April, 1840; and the two years expired after the sixth of April, 1842. The question, therefore, was, whether the suit could be further continued as to the Exchange Bank, and what was to be done, as to future proceedings.

STORY, Circuit Justice. The question comes shortly to this, that, during the pendency of the suit, the corporation becomes extinct by a voluntary surrender of its charter, and an acceptance of the surrender by the legislature. Under such circumstances it is asked, what is to be done, the corporation being defunct by operation of law? It was

[84] Compare Atlantic & Birmingham Ry. Co. v. Johnson, 127 Ga. 392, 56 S. E. 482, 11 L. R. A. (N. S.) 1119 (1906); Morrison v. American Snuff Co., 79 Miss. 330, 30 South. 723, 89 Am. St. Rep. 598 (1901); Prouty v. L. S. & Mich. S. Ry. Co., 52 N. Y. 363 (1873); National Bank v. Wilmington N. C. & S. Ry. Co. (Del. Ch.) 81 Atl. 70 (1911).

certainly a very unwise act for the legislature to accept a surrender of the charter, and not at the same time to save the rights of action of third persons against the corporation, and to continue the existence of the corporation quoad such rights. But the same case would have occurred, if upon a quo warranto a final judgment had passed against the corporation, declaring its franchises and privileges forfeited, and decreeing a seizure and resumption of the same by the government. Many of our banks are, by law, limited to a term of years for their corporate existence, and if there is no saving when the term expires, the corporation is de facto dead. Now I cannot distinguish between the case of a corporation and the case of a private person, dying pendente lite. In the latter case, the suit is abated at law, unless it is capable of being revived by the enactments of some statute, as is the case as to suits pending in the courts of the United States, where, if the right of action survives, the personal representative of the deceased party may appear, and prosecute or defend the suit. Judiciary Act 1789, c. 20, § 31 [1 Stat. 91]; 2 Tidd, Pr. (9th Ed. 1828) 932; Com. Dig. "Abatement," H. 32–35. No such provision exists as to corporations; nor, indeed, could exist, without reviving the corporation pro hac vice; and therefore, any suit pending against it at its death abates by mere operation of law. It seems to me, therefore, that the attorney for the corporation may well suggest the death of the corporation by plea or otherwise on the record, and if the fact is admitted, the suit as to the corporation will abate by operation of law, and render all farther proceedings against it void.[25]

MUMMA v. POTOMAC CO.

(Supreme Court of the United States, 1834. 8 Pet. 281, 8 L. Ed. 945.)

STORY, J. This is a writ of error to the circuit court of the District of Columbia, for the county of Washington. The case presented on the record is shortly this.

The plaintiff in error, Mumma, in June 1818, recovered a judgment against the Potomac Company, for the sum of $5,000. No steps were taken to enforce the payment of the judgment, nor any further proceedings had in relation thereto, until the 18th day of April, 1828, on which day a writ of scire facias was issued from the clerk's office of said court, against the said Potomac Company to revive said judgment, which case was continued, by consent of parties, from term to term, until December term of said court in the year 1830, at which term the following plea and statement were filed by consent of parties: "The attorneys upon the record of the said defendants, now here suggest and show to the court, that since the rendition and record of said

[25] Compare Platt v. Archer, 9 Blatchf. 559, Fed. Cas. No. 11,213 (1872); Fisk v. Union Pac. R. Co., 10 Blatchf. 518, Fed. Cas. No. 4,830 (1873).

judgment, the said Potomac Company, in due pursuance and execution of the provisions of the charter of the Chesapeake and Ohio Canal Company, enacted by the States of Maryland and Virginia, and by the Congress of the United States, have duly signified their assent to said charter, etc., and have duly surrendered their charter, and conveyed, in due form of law, to the said Chesapeake and Ohio Canal Company, all the property, rights, and privileges by them owned, possessed, and enjoyed under the same; which surrender and transfer from said Potomac Company have been duly accepted by the Chesapeake and Ohio Canal Company, as appears by the corporate acts and proceedings of said company, and the final deed of surrender from the said Potomac Company dated on the 15th day of August, 1828, duly executed and recorded in the several counties of the States of Virginia and Maryland, and the District of Columbia, wherein said Potomac Company held any lands, and wherein the canals and works of said company were situated; which said corporate acts and proceedings, the said attorneys here bring into court, etc., whereby the said attorneys say, the charter of the said Potomac Company became, and is vacated and annulled, and the company and the corporate franchises of the same are extinct, etc."

Whereupon the following statement and agreement were entered into and signed by the counsel for both parties, and made a part of the record.

"The truth of the above suggestion is admitted; and it is agreed to be submitted to the court, whether, under such circumstances, any judgment can be rendered against the Potomac Company upon this scire facias, reviving the judgment in said writ mentioned, and that reference for the said corporate acts and proceedings, and the deed in the above suggestion mentioned, be had to the printed collection of acts, etc., etc., printed and published by authority of the president and directors of the Chesapeake and Ohio Canal Company in 1828."

Upon this statement and agreement, the circuit court gave judgment, that the plaintiff take nothing by his writ; and the question now is, whether this judgment is warranted by law.

Two points have been made at the bar. 1. That the corporate existence of the Potomac Company was not so totally destroyed by the operation of the deed of surrender, as to defeat the rights and remedies of the creditors of the company. 2. That the deed of surrender violates the obligation of the contracts of the company, and that the legislative acts of Virginia and Maryland, though confirmed by the Congress of the United States, are on this account void; and can have no legal effect.

We think, that the agreement of the parties completely covers the first point, and precludes any examination of it. That agreement admits the truth of the suggestions in the plea of the attorneys for the Potomac Company; and by that it is averred, that the charter of the Potomac Company was duly surrendered to the Chesapeake and

Ohio Canal Company, and was duly accepted by the latter; and that thereby the charter of the Potomac Company became, and is, vacated and annulled. And, if we were at liberty to consider the last averment, not as an averment of a fact, but of a conclusion of law, the same result would follow; for the 13th section of the Act of Virginia, of January, 1824, incorporating the Chesapeake and Ohio Canal Company, declares, that upon such surrender and acceptance, "the charter of the Potomac Company shall be, and the same is hereby vacated and annulled; and all the powers and rights thereby granted to the Potomac Company shall be vested in the company hereby incorporated."

Unless, then, the second point can be maintained, there is an end of the cause; for there is no pretence to say, that a scire facias can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man. We are of opinion, that the dissolution of the corporation, under the acts of Virginia and Maryland (even supposing the act of confirmation of Congress out of the way), cannot, in any just sense, be considered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those States, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of bona fide purchasers; but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws.

Besides, the 12th section of the act incorporating the Chesapeake and Ohio Canal Company, makes it the duty of the president and directors of that company, so long as there shall be and remain any creditor of the Potomac Company who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company (which the act enables him to do), to pay to such creditor or creditors, annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors, at that time, may bear to the whole debt of $175,800 (the supposed aggregate amount of the debts of the Potomac Company). So that here is provided an equitable mode of distributing the assets of the company among its creditors, by an apportionment of its revenues, in the only mode in which it could be practically done upon its dissolution; a mode analogous to the distribution of the assets of a deceased insolvent debtor.

Independently of this view of the matter, it would be extremely difficult to maintain the doctrine contended for by the plaintiff in error, upon general principles. A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a sur-

render of its corporate franchises, and by a forfeiture of them for wilful misuser and non-user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy, and the nature and objects of its charter.

Without going more at large into the subject, we are of opinion that the judgment of the circuit court ought to be affirmed. But as there is no such corporation in esse as the Potomac Company, there can be no costs awarded to it.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed without costs.[86]

SECTION 5.—CREDITORS' RIGHTS AGAINST STOCKHOLDERS AND THEIR TRANSFEREES

I. At Common Law

PROCESS AGAINST CORPORATIONS. (B, a.)

(6 Vin. Abr. 310.)

1. Debt was brought against the Society of Lumbard Merchants of Florence, and the sheriff distrained 2 Lumbards, who came in person, and prayed their appearance to be recorded to save their issues as distinct persons, but not as of the Society of Lumbards, & ideo non allocature, but that they shall be put to their remedy against the Sheriff of London, by a general action of trespass; for where a corporation is impleaded, they ought not to distrain any private person; quod nota. Br. Trespass, pl. 135. cites 19 H. 6. 80.

2. Upon a dismission of a bill in Chancery, and that dismission enrolled, an appeal was to the Lords, setting forth that in the ordinary course of proceedings the Chancery could not relieve the plaintiff against the defendants, they being a company and served with process would not appear, they having nothing to be distrained by. The defendants being so many of the members of the company as were particularly named, did put in an answer, plea, and demurrer, and the company, though often summoned, did not appear. Their Lordships

[86] Compare Curran v. State of Arkansas, 15 How. 304, 14 L. Ed. 705 (1853).

ordered, that the dismission stand reversed, and that the Lord Chancellor &c. retain the bill, and that the Court of Chancery shall issue forth usual process of that court, and if cause be, process of distringas thereupon against the said corporation, provided the said process be served one month before the return thereof; and if upon return of the said process the said corporation shall not file an appearance, or shall appear and not answer, the said bill shall be taken pro confesso, and a decree shall thereupon pass. But in case the said corporation shall appear and answer within the time aforesaid then the Court of Chancery shall proceed to examine what the plaintiff's just debt is, and shall decree the said company to pay so much money as the same shall appear to amount unto, with reasonable damages. And in case the corporation shall not pay the sum decreed within 90 days after the service of the said decree upon their governor, deputy governor, treasurer, clerk, or secretary for the time being, then the Lord Chancellor, or Lord Keeper for the time being, shall order and decree, that the governor, or deputy-governor, and the 24 assistants of the said company, or so many of them as by the tenor of their charter do constitute a quorum for the making of leviations upon the trade or members of the said company, shall within such time, as by the Lord Chancellor or Keeper shall be thought fit, make such a leviation upon every member of the said company as is to be contributary to the publick charge, as shall be sufficient to satisfy the said sum to be decreed to the plaintiff in that cause, and to collect and levy the same, and to pay it over to the plaintiff as the Court shall direct; and such a leviation is to be put in writing, and signed with the hand of the governor, deputy-governor, and assistants of the aforesaid company for the time being, and so many of them, as by the constitution of the said charter, do make a quorum, shall not make or return such leviations as aforesaid, the Lord Chancellor, or Lord Keeper, may issue process of contempt against them, as is usual against persons in their natural capacity; and if by the said time so to be limited by the said Court of Chancery, the said money so to be assessed, shall not be paid, then, and from thenceforth, every person of the said company upon whom such a leviation shall be made to be liable in his capacity to pay his quota or proportion assessed; and the Lord Chancellor, or Lord Keeper, is to order or decree, that such process shall issue against any such member so refusing or delaying to pay his quota or proportion, as is usual against persons charged by the decree of the said Court for any duty in their several capacities; and if the total so returned and filed with the register, shall not amount to so much as shall be sufficient to satisfy the sum decreed, with respect had to such persons as shall make it appear that they are overcharged, or ought not to be charged at all, then the said Lord Chancellor, or Lord Keeper for the time being, may from time to time order that a new leviation be made and returned into the registers of the Court of Chancery, of such sum as shall be sufficient by way of supplement for that purpose, to the payment whereof

every individual person is to be bound in such manner as aforesaid. Chan. Cases 206, 207, Trin. 23 Car. 2 Dr. Salmon v. the Hamborough Company.[87]

ADLER v. MILWAUKEE PATENT BRICK MFG. CO.

(Supreme Court of Wisconsin, 1860. 13 Wis. 57.)

Appeal from the Circuit Court for Milwaukee County.

The complaint in this action (which was commenced in June, 1858) alleged that the Milwaukee Patent Brick Manufacturing Company was organized in 1855, under an act of the legislature; that the other defendants became subscribers to its capital stock in certain amounts; that the company went into business in 1855, and continued therein until June, 1857, when it became insolvent, having ceased its business and relinquished its organization; that on, etc., the plaintiff obtained a judgment in the county court of Milwaukee county against the company for $1,862; that an execution was issued thereon to the sheriff of said county, and returned wholly unsatisfied; that said company had no property whatever; that the co-defendants of the company had not paid more than ten per cent. of the capital stock subscribed by them respectively; that two of said co-defendants, and perhaps others of them were insolvent; and that there were other creditors of the company beside the plaintiff, whose demands were unpaid; wherefore the plaintiff prayed that an account might be taken of what was due from said company to all persons who might elect to come in as creditors thereof under the judgment in this action; that an account might also be taken of the amounts respectively paid by the several co-defendants of the company upon their subscriptions to its stock, and of the amounts yet unpaid thereon; that it might be ascertained who, if any, of said defendants were insolvent; that said co-defendants might be decreed to pay so much of the balance found unpaid on their respective stock subscriptions as would be sufficient to pay the debts of the company when so ascertained; and that a receiver might be appointed, &c. The defendants answered.

When the case came on for trial, the defendants moved to dismiss the complaint for want of jurisdiction, and because the complaint did not state facts sufficient to constitute a cause of action; and the court made an order dismissing the complaint, from which the plaintiff appealed.

DIXON, C. J.[88] It would be much against reason and common justice, if the stockholders of an incorporated company, like the principal defendant in this action, after having paid in the amount of their stock subscriptions according to the requirements of its charter, should

[87] See Doctor Salmon v. Hamborough Company, Cases in Chancery, 204 (1671); Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412 (1850).

[88] A part of the opinion dealing with a statutory question is omitted.

be permitted afterwards, and without first discharging the liabilities of such company to the extent of such subscriptions, to withdraw their stock and leave its creditors unsatisfied. It would be equally contrary to the plainest principles of law and equity, as well as common sense, after having subscribed the requisite amount of stock to give the corporation a legal existence, though the same should remain in whole or in part unpaid, and after having organized it, to allow them through their own or the willful neglect and dishonest practices of its officers to refuse to pay in so much of such unpaid stock as may be necessary to discharge the fair and just debts due from the company, and which have been contracted on the foundation of such subscription and organization. The stockholders being in general free from personal responsibility, the capital stock constitutes the sole fund to which creditors look for the liquidation of their demands. It is the basis of the credit which is extended to the corporation by the public, and a substitute for the individual liability which exists in other cases. So far as creditors are concerned, it is regarded in the law as a trust fund, pledged for the payment of the debts of the corporation. Until they are paid the stockholders are postponed; they are only entitled to that which remains after the claims of the creditors are extinguished. This is as true of the unpaid shares subscribed, or balances due thereon, as of the amount which has actually been paid in. Such unpaid shares or balances are as much a part of the capital stock as the sums which have already been realized thereon. Aside from the funds on hand, they often constitute the only resource of the company. They are debts due to it, the payment of which can be enforced by its officers. The delinquent subscribers are its debtors, and the directors are clothed with authority to compel them to pay. When the company is indebted, and other means of meeting its liabilities are exhausted, the exercise of this authority becomes a duty which they are under the highest moral obligation to perform. Creditors are supposed to have trusted as well to such unpaid subscriptions, and to the fair and faithful exercise of such compulsory power, for their payment, as to the funds actually paid in; and when it becomes necessary to their security or satisfaction, they have a legal right, either by the voluntary action of the proper officers, or through the aid of the courts of the country, to such exercise of it. If, therefore, by the willful or stubborn inaction of the directors or stockholders, the company fails to meet its obligations and perform its duties, a court of equity will, on a proper application, afford the requisite relief.

The following authorities cited by the counsel for the appellant clearly establish that, at the common law and without any statutory authority for that purpose, and as a sort of distinct exercise of equitable jurisprudence, courts of chancery will grant relief in such cases. They are Spear v. Grant, 16 Mass. 9; Vose v. Grant, 15 Mass. 505; Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; Ward v. Griswoldville Mfg. Co., 16 Conn. 593; Mann v. Pentz, 3 N. Y. 415; Nathan

v. Whitlock, 9 Paige (N. Y.) 152; Henry v. V. & A. R. R. Co., 17 Ohio, 187; and Ogilvie v. Knox Ins. Co., 22 How. 380, 16 L. Ed. 349. These authorities also sustain the general principle above stated.

Such actions, when prosecuted independently of any statutory provision, are sustained on the ground that the capital stock, being a trust fund, may be followed by the creditors and others having an interest in the proper application of it, into the hands of third persons having notice of the trust attaching to it; and that stockholders, whether delinquent or withdrawing are always, both in law and fact, affected with such notice. The rights of creditors being superior, and partaking somewhat of the character of a lien, equity will regard and work them out by the same means by which the corporation itself should have done so. Such actions are also in many respects like an ordinary creditor's suit, but on account of the peculiar nature of the trusts to be enforced, I am inclined to agree with counsel that, at least as against stockholders, they might still be maintained, though the creditor's bill should be abolished by statute.

The practice in such case, in those states where the mode of closing up the affairs of non-paying and insolvent corporations, and of distributing the proceeds of their property and effects among their creditors is governed by the common law, is, as indicated by the authorities to which reference has been made, precisely that which was adopted by the appellant in this case. The creditor is first to establish his claim by judgment at law, and then, after execution issued and returned in whole or in part unsatisfied, he may file his bill in his own behalf and in behalf of such other creditors of the corporation as may elect to become parties thereto, against the corporation and its delinquent or withdrawing stockholders, alleging the recovery and non-payment of his judgment, and praying the decree or order of the court that an account of the assets and debts be taken, and a receiver be appointed, and that the stockholders and officers pay in and account to the receiver for so much of the capital stock as will be sufficient to pay the debt of the plaintiff, and those of such other creditors as may choose to join him and come in under the decree; and that the receiver be directed to apply the same in discharge thereof. Whether in those cases where the stockholders are not individually liable by law for the debts of the corporation one creditor can, by superior diligence, acquire a preference over the other creditors, beyond that which might result from his judgment becoming a lien on specific property, or his having otherwise obtained a higher security at law, does not distinctly appear.

But the conclusion from the cases and the general doctrines of courts of equity, is, I think, that he cannot, and that when he is obliged to seek the aid of those courts for the enforcement of his demand, he must do so for the benefit of all other creditors who may desire to unite with him; and that all must share alike, in proportion to the amount of their respective claims, in the funds which may be realized

by the proceeding. The maxim of the law in like cases is, that equality is equity; and certainly no case more appropriate for its application could be imagined. I conclude, therefore, and the authorities clearly tend to sl ow, that such is the practice.

The authorities likewise show that in such actions, unless it be impossible or impracticable, all the stockholders must be made parties. This is required in order to enable the court to do complete justice between the stockholders themselves, and so that no one of them may be compelled to pay more than his due proportion, and that all alike may be obliged, according to the number of their respective shares and their pecuniary ability, to contribute toward the losses which the company may have sustained. For it would be manifestly wrong and unjust to allow the creditors to select one or more of the stockholders and compel them to submit to burdens from which the other shareholders, though equally bound, are exonerated. Hence the shareholding defendants have the right, unless some good reason for the omission be shown, to insist on all other shareholders being parties also.

From this view of the general powers of the courts of equity to manage and control the affairs of failing and bankrupt corporations, it becomes a matter of very little practical importance whether sections 6 and 7 of chapter 114, R. S., 1849, which were in force when this suit was instituted, and which are now found as sections 18 and 19 of chapter 148 of the revision of 1858, are held to be operative or not. If operative, they are in affirmance of the law as it was previously understood; if inoperative, no substantial change is occasioned. * * *

The order of the circuit court dismissing the complaint, must therefore be reversed, and the cause be remanded for further proceedings in accordance with this opinion.[39]

CLAPP et al. v. PETERSON.

(Supreme Court of Illinois, 1882. 104 Ill. 26.)

SHELDON, J.[40] By the will of her step-son, P. W. Bonner, who died in July, 1870, appellee, Georgie H. Peterson, a resident of the State of New York, became owner of all personal property left by said Bonner, and in September, 1870, on application made to her in New York, she sold all said property to the Illinois Land and Loan Company. On November 20, 1874, she filed her bill against said company to set aside such sale, and for other relief in respect thereto, on the ground that she had been induced to make the sale through the fraudulent misrepresentations of the company, for an inadequate consideration, and on May 1, 1877, she obtained in the suit a money decree against the

[39] Compare Hodges & Wilson v. Silver Hill Mining Co., 9 Or. 200 (1881).

[40] A part of the opinion is omitted.

company, for $5653.33. An execution issued upon the decree having been returned nulla bona, Mrs. Peterson, on September 18, 1879, filed her bill in chancery in the present case, to subject property in the hands of Caleb Clapp to the payment of this decree. A decree was entered in her favor granting the relief sought, which on appeal to the Appellate Court for the First District, was affirmed, and the present appeal taken to this court.

It appears that the Illinois Land and Loan Company was chartered by an act of the Legislature in 1867, with a capital stock of $100,000, with 1,000 shares of $100 each, all of which was paid in. Caleb Clapp, a non-resident of the State, was a stockholder in the company, and in January, 1874, he surrendered to the company 555 shares of stock, in consideration of which the company executed to him a deed of warranty of two lots in Chicago, one of the value of $50,000, and the other of the value of $5,500, that amount being the consideration stated in the deed. The stock was canceled, and was considered, at the time, of par value. Mr. Clapp continued to be till his death, and his estate still is, the owner of the lots. It is these lots which are sought to be subjected to the payment of said money decree against the company.

* * *

The shareholders of a corporation are conclusively charged with notice of the trust character which attaches to its capital stock. As to it they cannot occupy the status of innocent purchasers; but they are to all intents and purposes privies to the trust. When, therefore, they have in their hands any of this trust fund, they hold it cum onere, subject to all the equities which attach to it. Thompson's Liability of Stockholders, § 13; Wood v. Dummer, 3 Mason, 312, Fed. Cas. No. 17,944.

It is objected, against the principles above stated, that the cases in which they were declared were where there was actual or constructive fraud or unfairness, where the corporations were insolvent, or in process of being wound up. The question naturally would arise mostly in such circumstances, but the principles enunciated are general in scope, following from the nature of the capital stock of corporations, and the relation of a stockholder to the corporation, and we know of no limitation of their application as above suggested, or reason for denial of their full applicability to the present case. Indeed, we do not understand appellants' counsel as asserting the validity of the purchase, or reduction by a corporation, of its stock, where it should directly appear that it was an injury to its creditors. But it is denied that there was any such injury in this case.

It is said, first, the company actually owed no one at the time, and even if it did, as the bill admits that the shares at the time of the exchange were valued at par, and worth full purported value, it follows from the stock being worth its par value, as a matter of course, that the company was then entirely solvent, and had assets sufficient to discharge all its debts, if it had any debts, and also to pay the stock in

full,—that under no other circumstances could the admission of the bill be true. There was no proof as to the condition of the company, or the value of the stock, save the testimony of the secretary of the company that at the time of the deed to Clapp the stock in the company was at par value technically,—that he did not know what the market value was, and did not know that it had any market value. The admission of the bill was the simple fact that the stock was at par. The complainant, of course, knew nothing as to what made the stock at par. But if the stock was at par, in so rating it this indebtedness to appellee could not have been taken into account. It was supposed, of course, the purchase of personal property, which had been made of appellee, would stand, and that there was no liability on account of it. If, then, the stock was just at par, not considering appellee's claim with, that claim recognized, the assets would have failed to pay the indebtedness of the company by the amount of her claim, to wit, $5,653.33, and to that amount the company was insolvent.

It is insisted that this exchange of corporate property for stock was unassailable by any one, because it was an exchange of equal values; the lots being worth $55,500, and the shares of stock being worth $55,500, there was equal value received, and there could be harm to no one. This cannot be so, as respects creditors. Suppose all the remaining property of the company had been one other lot worth $44,500, and the company had made a like exchange with another stockholder of that lot for the remaining 445 shares of stock, and cancelled the stock, what would there have been left to pay creditors? The partial exchange which was made affected the rights of creditors in a like way, only to a less extent. It is not as if there had been an exchange made with Clapp of these lots for other real property of equal value, or as if there had been a sale to him for $55,000 in money. In such case a substitute would have been furnished to the company to which creditors might have had recourse for payment of their debts. But the exchange of corporate property for shares of stock, and cancelling the stock, furnishes no equivalent for creditors.

Although the money decree in favor of appellee was not obtained until in 1877, some time after Clapp's purchase, yet the cause of action of appellee against the company (the fraudulent purchase of the personal property from her) arose in September, 1870, which was before the purchase by Clapp, that being in January, 1874, so that at the time of Clapp's purchase appellee must be regarded as being a creditor of the company.

We can but regard the transaction in question, of the exchange of stock for the lots and the cancellation of the stock, as a withdrawal by the stockholder of his share of the capital stock, leaving appellee's debt against the company unpaid; that the transaction was to the injury of appellee as a creditor; that the property taken by Clapp stood charged with a trust for the payment of appellee's claim; that Clapp

cannot be held to be an innocent purchaser, and that the property in his hands is affected with the trust, and appellee may pursue the property and subject it to the satisfaction of her debt.

It is insisted there was such laches here on the part of appellee in lying by for so long a time before the purchase by Clapp, taking no steps to disaffirm the fraudulent purchase from her, as should estop her from resort to this property in the hands of Clapp. Had appellee known of the fraud upon her, or should have known of it in the exercise of reasonable diligence, there would have been force in this position; but the bill alleges that on the discovery of the fraud appellee filed her former bill to set aside the fraudulent sale, and if such was the fact no laches would be imputable to her. Appellee's residence in a distant State would be a circumstance which would go to account for not sooner discovering the alleged fraud. We are not prepared to say that there was such laches here as should disentitle to the relief sought.

It is said that appellee's decree against the company was rendered, as well as the suit commenced, after Clapp had ceased to be a member of the company, and not being a party to the suit he should not be bound by the decree against the company, and that as against him the decree should not be taken as evidence of the alleged fraudulent purchase by the company from appellee. We think Clapp took the property affected with all equities as against the company, and subject to the equity of being charged with whatever prior claim might be established as against the company, and the decree is the highest evidence of an indebtedness by the company.

It is finally urged that at least the decree is erroneous in holding the property received by Clapp to be chargeable with the whole debt, instead of a share of it, in the proportion his stock bore to the whole capital stock. As among the stockholders such a pro rata decree would have been equitable. But in such a case as this, of a judgment creditor, after return of an execution against the company unsatisfied, seeking in a court of equity to reach certain specific property once belonging to the company, as charged with a trust for the payment of his debt, he may pursue the property into whosesoever hands he may find it, where it stands affected with the trust, and subject it to the satisfaction of his debt, and he is not obliged to attend to adjusting the equities between the stockholders. We regard the following authorities as fully warranting this, and the form of the decree in this respect; Bartlett v. Drew, 57 N. Y. 587; Marsh v. Burroughs, 1 Woods, 463, Fed. Cas. No. 9,112; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.[41]

[41] Compare McDonald v. Williams, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. Ed. 1022 (1898); Reid v. Eatonton Mfg. Co., 40 Ga. 98 (1869); In re Mercantile Trading Co., L. R. 4 Ch. App. 475 (1869).

In re IMPERIAL LAND CO. OF MARSEILLES.

Ex parte JEAFFRESON.

(Court of Chancery, 1870. L. R. 11 Eq. Cas. 109.)

This was a summons that an order of the 14th of May, 1870, whereby Mr. Jeaffreson was required to pay £243. 2s. 4d. to the liquidators of the Imperial Land Company of Marseilles, Limited, might be discharged, or that the execution thereof might be stayed, and that the liquidators of the company might be directed to treat the sixty-four shares of the applicant in the company as paid up to the extent of £896., and that no further call might be made thereon until it should be right and proper to do so, regard being had to such direction.

The case was selected as representative of one of a large class of the shareholders in the company. * * *[42]

Sir R. MALINS, V. C. This is a somewhat complicated case, and I was for some time impressed with the arguments on behalf of Mr. Jeaffreson; but on consideration of all the facts and documents before me, I am obliged to decide against him.

The facts are shortly as follows: The company was formed early in 1866; and Mr. Jeaffreson took sixty-four shares, and paid up £10. per share, making altogether £640. The company being in difficulties, a circular was issued on the 27th of April, 1867, proposing a plan of reconstruction, which was, in fact, for the formation of a new company to take over the assets and liabilities of the old company. The benefit to be derived by the shareholders from this arrangement was, their being exonerated from the payment of the remaining £10. per share. If the plan had succeeded, there would have been an end of any claim against the shareholders as such. As regards Mr. Jeaffreson, his liability would have been changed from £640. upon his shares to £320. on debentures bearing interest at 6 per cent. This plan of reconstruction was carried out by formal resolutions passed at an extraordinary meeting of the company and duly confirmed, and ultimately, by a deed of the 23d of September, 1867, formally carried into effect. It is agreed on both sides that this was the basis of the transaction, and that the position of those who adopted the arrangement was that of holders of fully paid-up shares and debentures partly paid up. Under these circumstances Mr. Jeaffreson might well be warranted in believing that payments which he made upon the debentures would pro tanto discharge the liability upon his shares in the old company; and if affairs had gone on well, there would have been eventually an end to his liability to the old company. I must, however, hold that he was bound to know that he could not

[42] A part of the statement of facts omitted, as sufficiently stated in the opinion.

discharge his liability as a shareholder in the old company by payments to the new company.

If all parties having an interest in the arrangement had assented to the plan of reconstruction, I should have held it binding, on the principle that payment to A. by the direction of B. is equivalent to payment to B. Then the question is, whether all interested parties did assent. The creditors were the persons most immediately interested, but they were no parties to the transaction, and never gave their authority to the payments to the new company. It follows, therefore, that if these calls are required for the payment of the creditors of the old company, they must be paid; for, as regards the creditors, Mr. Jeaffreson remained a shareholder liable for sixty-four shares, and he still remains equally liable. It is urged that, as the money can be provided by making calls upon the shareholders who have not paid instalments upon the debentures, those who have so paid ought not to be required to pay anything more till an equivalent amount has been paid by the others. But this question cannot arise till the creditors have been paid in full. In Ex parte Oakes & Peek, Law Rep. 3 Eq. 576, I adopted the rule that the creditors are the persons whose interests are first to be considered in a winding-up, and that the amount unpaid upon the shares is part of the assets of the company.

This rule has received universal acknowledgment, being fully recognized and acted upon by the House of Lords when the same case went before them on appeal, Law Rep. 2 H. L. 325. But when the creditors are once paid, I am of opinion that the other shareholders will have to exonerate Mr. Jeaffreson from the additional liability which he has incurred by joining the new company, and he will ultimately be entitled to stand, as against the other shareholders, in the place of the creditors who may be paid off out of the present calls. I cannot go into any question as to how much of the present calls are required for the payments of the creditors. I consider myself bound to take the representation of the counsel for the liquidators and the creditors' representative that the money is required for the payment of debts, and must leave Mr. Jeaffreson liable to pay the full amount of the calls.

The result, therefore is, that the summons must be dismissed so far as it requires the discharge of the order or restraint of execution; and so far as it requires the equities between the shareholders to be determined, it is unnecessary, inasmuch as that is always done. The summons will, therefore, be simply dismissed. As the case has been arranged to be taken as a representative one, the costs of all parties will be out of the estate.

Mr. Crossley has no right to appear, and cannot have any costs.

HENRY et al. v. VERMILLION & A. R. CO. et al.

(Supreme Court of Ohio, 1848. 17 Ohio, 187.)

The bills are in the form of creditors' bills, charging that the complainants have unsatisfied judgments against the Vermillion & Ashland Railroad Company, on which executions have been issued and returned nulla bona; that the company is insolvent and has ceased to keep up its organization, and that the other defendants are stockholders in said company, and indebted to the company upon their stock subscriptions, and praying that such indebtedness may be subjected to the payment of complainants' judgments. * * *[48]

AVERY, J. These bills are filed under the act directing the mode of proceeding in chancery. Swan's Statutes, 704, § 16. They set forth judgments at law recovered against the company; further, that after efforts made they could not be collected by execution, and that the individual defendants are indebted to the company as stockholders upon their stock subscriptions. The principle has already been recognized by this court, that a creditor's bill will lie against a stockholder of an incorporated company, to compel him to pay over to a judgment creditor the amount of his subscription, which had not before been paid to the company (Miers v. Zanesville & M. Turnpike Co., 11 Ohio, 273; Id., 13 Ohio, 197); and the authority of these cases we find no reason to deny. The creditor, in ordinary cases, may well treat the unpaid balance of stock, as a debt due to the company and proceed to subject it under the statute, as he would any other debt. The company could compel payment at law, of the stockholder's contract, according to the charter, when the necessities or the interest of the company should require this to be done. And if the company does not, by such means or some other, provide funds for payment, there seems no good reason why the judgment creditor should not have the remedy here sought.

There may be cases, indeed, where the stockholder would be absolved in equity, from paying up his stock to the company, where he might enjoin them from proceeding against him, and where, by a fraudulent combination between them and the judgment creditor, he might resist or enjoin the creditor. But if the company become embarrassed or insolvent, and unable any further to pursue the object for which they united, either by fraud in the men chosen as managers, or by the occurrence of events which could not be controlled, no reason is thereby furnished to justify a violation of that contract, by which they agreed to pay for services rendered in the prosecution of their work. And the company, after discovering that there was no longer any hope of succeeding in their enterprise, and that all they had expended must be lost, would have been still justified in collecting all their means for

[48] A part of the statement of facts relating to pleading is omitted.

the discharge of debts already contracted. There was a moral obligation both upon the officers and the stockholders to use the property and claims of the company, as far as they would reach, for the payment of the demands of creditors. And when the company cease to keep up their organization and abandon all action under the charter, a proceeding at the instance of the creditor becomes indispensable. In looking over the testimony in these cases, we do not discover any facts that should absolve the stockholders from paying the amount due on their subscriptions, for the benefit of the creditors, nor any fraud or conspiracy on the part of complainants, which should deprive them of their rights as creditors.

An objection is urged against the judgments, upon which the proceedings are founded. But the objection cannot be allowed to prevail, in a case like the present; even if there were irregularities in these judgments, and fraud in giving them, or mistake, by accident or otherwise, in the amount, it would constitute no defense, either in whole or in part, in these cases. The judgments cannot be impeached, collaterally. Between the parties who had a legal right to fix the amount, it has already been done; and nothing is left as against the debtors of the company, but to determine the amount due from them. But here, service has been made upon the company, and they are before the court as defendants. And further, they have answered, and admitted the correctness of these judgments. Then, supposing the liability of the defendants established, what principle shall guide the master in the reference to be made to him?

When a company, as in this case becoming insolvent, abandon all action under their charter, the original mode of making calls upon the stockholders cannot be pursued. The debt, therefore, from that time, must be treated as due, without further demand.

Stockholders who have attempted to secure, by agreement, a privilege of paying up their stock subscriptions, in goods or otherwise, except in money, as contemplated by the charter, will not be allowed the benefit of such stipulations. Such an agreement will be considered as a fraud upon other stockholders, and the amount due must be collected in money.

Although the stockholders were required to pay, at the time of subscription, five dollars on each share subscribed, still, in the opinion of the court, the omission to pay that sum does not release them from the liability to pay up the subscription.

These are supposed to be all the points necessary to be settled at the present time; and the cases are remanded, for further proceedings, to the court in the county from whence they were brought.[44]

[44] Accord: Noble v. Callender, 20 Ohio St. 199 (1870).

BAUSMAN v. KINNEAR.

(Circuit Court of Appeals of the United States, 1897. 79 Fed. 172, 24 C. C. A. 473.)

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge.[45] The receiver of the Ranier Power & Railway Company appeals from a decree of the circuit court (73 Fed. 69) dismissing his bill as against the defendant, George Kinnear, in a suit brought against certain stockholders of the Ranier Power & Railway Company to require them to pay their subscriptions to the stock of said corporation. Kinnear held stock of the par value of $5,000. In his answer to the bill he alleged that he had paid the full amount of his subscription. The undisputed facts are as follows:

On the 17th of October, 1891, Kinnear had paid three assessments of 5 per cent. each upon his capital stock, amounting in all to $750. On that date, a promissory note, due 90 days after date, payable to the corporation, for the sum of $3,197.29, was presented by an officer of the corporation to Kinnear for his signature, with the statement that Mr. Denny, the president, wanted to raise money for the company. Kinnear signed the note without question. The note was indorsed by David T. Denny, who was the president, and the largest stockholder. It was discounted at the bank, and the proceeds were used by the corporation in constructing its street railway. Subsequently to that date another assessment of 5 per cent. was made on the capital stock, and Kinnear paid his proportion thereof in the sum of $250. When the note fell due, it was renewed, and was regularly thereafter renewed until December 10, 1892. At each renewal other shareholders indorsed the note, and the interest was paid by the president or by the company. On February 15, 1893, when the last note fell due, the amount was increased to $5,000, and the increased amount thereof was obtained from the bank, and was used by the corporation as before. When the $5,000 note fell due, on May 16, 1893, it was renewed for one year; but it was made payable, not to the company, but to David T. Denny. In June of that year the receiver was appointed, and eight months later Kinnear paid the note in full.

It was found in the opinion of the court below as follows: "These notes were not given by Mr. Kinnear in payment for his stock, but were intended as a loan of credit, to assist the company at a time when it was incurring debts in the construction of its line of street railway, so as to enable the company to obtain funds without resorting to assessments upon its capital stock, which at that time would have been burdensome to its stockholders, and specially so to Mr. Kinnear. These notes were given, however, in consideration of Mr. Kinnear's liability for his unpaid subscription. He was not indebted to the company on

[45] A part of the opinion is omitted.

any other account, and would not have loaned his credit to the company for any other purpose than to avoid being required to pay for his stock."

The court held, upon this state of the facts, that the defendant, Kinnear, had the right to have the money received by the corporation upon his note set off against his liability upon his stock subscription. The question presented for our consideration is whether, upon the facts so found, and the further facts as disclosed in the record, such offset was permissible. * * *

The facts as found by the trial court and as disclosed by the evidence amount to this: That the appellee, by lending his credit to the corporation, became a creditor thereof in an amount exceeding the amount of his liability for unpaid stock, and that the inducement for such loan of his credit was the fact that he was a subscriber to the unpaid stock of the corporation. A stockholder who is also a creditor of a corporation has no right to set-off as against his unpaid subscription, after the corporation has become insolvent, and a suit in equity has been brought to wind up its affairs and distribute its assets. The unpaid stock is held to be a trust fund for the purpose of paying the debts of the corporation, and as such it must be distributed among the creditors pro rata. The debt due to a stockholder is entitled to no preference over other debts, and he cannot require its payment by way of set-off, to the exclusion or postponement of other claims. The reason usually assigned for this rule is that the debt owing by the stockholder to the corporation after insolvency and that owing from the corporation to him are not in the same right, the former being a debt payable to a trust fund. The decisions upon this proposition appear to be unanimous. Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Williams v. Traphagen, 38 N. J. Eq. 57; Thompson v. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797; Carbon Co. v. Mills, 78 Iowa, 460, 43 N. W. 290, 5 L. R. A. 649; McAvity v. Paper Co., 82 Me. 504, 20 Atl. 82; Shickle v. Watts, 94 Mo. 410, 7 S. W. 274.

In some jurisdictions the rule has been extended, not only to the distribution of the trust fund arising from unpaid subscriptions, but to the distribution of the fund obtained under proceedings to enforce the statutory liability of stockholders. Matthews v. Albert, 24 Md. 527; In re Empire City Bank, 18 N. Y. 199; Buchanan v. Meisser, 105 Ill. 638; Liquidators v. Troop, 31 Am. & Eng. Corp. Cas. 410. The reason of the rule applies to all cases of simple indebtedness from the corporation to a stockholder, and upon principle no distinction can be made on account of the purpose for which the debt was incurred, or the motives that prompted the stockholder to become a creditor. One who lends money to a corporation on account of the fact that he owes unpaid stock in the company is in no better attitude than one who lends money for other reasons. The court will not inquire into the reasons that actuated him. It is unimportant whether the appellee

in this case loaned his credit to the corporation only because he was a subscriber to unpaid capital stock, or whether he loaned it on account of his desire for the success of its business, and his pecuniary interest therein as a holder of its stock. A stockholder who has advanced money to his corporation is no more entitled to the right of set-off than is the stockholder who has any other kind of claim against the company. Matthews v. Albert, supra. The set-off, if made at all, must be made while the corporation is a going concern. It cannot be made after the insolvency has intervened, and a court of equity has been called upon to administer its affairs. * * *

The decree dismissing the bill as to the defendant, Kinnear, is reversed, at the appellee's costs, and the cause is remanded for further proceedings not inconsistent with this opinion.[46]

HENDERSON v. ROYAL BRITISH BANK.

(Court of Queen's Bench, 1857. 7 El. & Bl. 356.)

Aspland, in this Term, obtained a rule calling on Leonard Morse Goddard to show cause why the plaintiff should not be at liberty to issue execution against the person, property, or effects of the said L. M. Goddard, as a shareholder of the Royal British Bank, for the sum of £131. 3s. 11d., remaining due on a judgment recovered by the plaintiff against the said Bank for the sum of £178. 8s. 9d. * * *[47]

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

This was an application for leave to take out execution against a shareholder: and the proposed answer to the application was, that the shareholder had been induced by fraud to take the shares. He had remained a shareholder for some time, and received dividends, and acted in all respects as a shareholder until the Royal British Bank stopped payment, and until its bankruptcy; and he then gave notice that he was no longer a shareholder, and, as far as he could, disaffirmed the contract under which he became a shareholder as being induced by the fraud of the directors: he demanded back all the moneys he had paid, and, being a depositor himself, he demanded the deposit and all the advances. The question is, whether, if it were established that this fraud had been practised upon him, it could be an answer to this application. If there were any doubt about it, we should not make this rule absolute; but we should direct a scire facias to issue, so that the question might be raised on the record. We entertained no doubt on the argument: but, being informed that similar applications had been made to the Courts of Common Pleas and Exchequer, and that rules

[46] Compare Pondville Co. v. Clark, 25 Conn. 97 (1856); Goodwin et al. v. McGehee et al., 15 Ala. 232 (1849); Wilkinson v. Bertock & Co., 111 Ga. 187, 36 S. E. 623 (1900).

[47] Facts sufficiently stated in the opinion of the court.

were depending in those Courts, we thought that, upon a matter of this sort, it would be well if we had a conference with the other Judges before our judgment was given. That conference has taken place: and the Judges are unanimously of opinion that this can be no answer to the application either upon principle or authority.

This is an application by a creditor, who, upon the faith of the party, who then was a shareholder, and who held himself out to the world as a shareholder, and being one, gave credit to the Bank. He has obtained judgment against the Bank. There were no assets of the Bank as a Company. And the application now is that execution may issue against that party individually. It would be monstrous to say that, he having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the Bank, who had given credit to it on the faith that he was a shareholder. It would be monstrous injustice, and contrary to all principle. Whether he could say that, with regard to other shareholders not privy to the fraud, we need not say; there may be some difficulty about that. But that is not the question we have to determine; which is, simply, whether this is an answer to a creditor who has given trust upon the faith of his being a shareholder. Suppose this were a common partnership, and that there was credit given to the firm: would it be any answer to an action by the creditor against one of the partners that the defendant was fraudulently induced by the other partners to become a partner? Inter se that might be considered: but, as between the firm and a creditor, it is a matter wholly immaterial. Now the party here admits that he is a shareholder, and acted as such until the Bank stopped payment. His name was placed on the register, and remains on the register. There is some irregularity in that register: but we are of opinion that all that is said in the statutes as to the manner in which the register shall be intituled and made up is only directory and not conditional, and that he was bound, at all events prima facie, by his name appearing on the register, notwithstanding those errors. The rule will therefore be absolute. See Daniell v. Royal British Bank, 1 H. & N. 681, and Powis v. Harding, 1 Com. B. N. S. 533, decided on the authority of the case in the text.

"Ordered: That the plaintiff be at liberty to take out of Court, in part satisfaction of his judgment herein, the sum of £125., paid into Court by the said L. M. Goddard; and that the plaintiff be at liberty to issue execution against the person, property, or effects of the said L. M. Goddard, as a shareholder of the Royal British Bank, for so much of the sum of £131. 3s. 11d. remaining due on a judgment recovered by the plaintiff against the said Bank for the sum of £306. 13s. as may not be satisfied by the money so to be taken out of Court by the plaintiff, and the dividend (if any) received by the plaintiff, under

the adjudication of bankruptcy against the Bank, and if not already credited by the plaintiff." (Costs of application to be paid by Goddard.) [48]

NEWTON NAT. BANK et al. v. NEWBEGIN.

(Circuit Court of Appeals of the United States, 1896. 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727.)

While the N. Bank was in embarrassed circumstances, plaintiff was induced, by the fraudulent misrepresentations of its cashier, to subscribe, in May, 1890, for 62 shares of a proposed increase of its capital stock, and to pay in a large sum of money therefor. In the following November the bank failed, and plaintiff, who lived at a distance, in another state, receiving then his first intimation that anything was wrong, proceeded to make inquiries, and, as a result, instituted proceedings before the comptroller of the currency to have the stock standing in his name declared void, and himself not a stockholder. These proceedings failing, he took steps in May, 1891, to have a bill filed to rescind his subscription. At the request, however, of parties who were trying to reorganize the bank, he consented to withdraw such suit, and surrender his stock to be canceled, upon an express agreement that it should be without prejudice to his right to sue the bank for the fraud by which he had been induced to subscribe and pay his money therefor. Plaintiff did not participate in the reorganization, and consistently maintained that he was not a stockholder, and that the bank was liable to him for the money paid. Upon the reorganization the creditors of the bank accepted in settlement a payment in cash, and certain certificates of indebtedness. In November, 1891, plaintiff brought this action against the bank to recover the money paid by him, as a deposit. From a verdict and judgment in favor of the plaintiff, the defendants, the Newton National Bank and John Watts, its receiver, bring the case to this court by a writ of error.[49]

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge.[50] [After discussing the question of the plaintiffs' laches, the court proceeds:]

A more important question, to be next considered, is whether the circuit court should have directed a verdict for the defendants on the ground that the insolvency of the defendant bank, occurring before the suit was filed, precluded the plaintiff from rescinding his stock subscription. It has become the settled rule in England, since the decision in Oakes v. Turquand, L. R. 2 H. L. 325, 344, that a suit to rescind a stock subscription on the ground of fraud cannot be main-

[48] See accord: Oakes v. Turquand and Harding, L. R. 2 Eng. & Irish App. Cas. 325 (1867).

[49] Statement of facts substituted.

[50] A part of the opinion is omitted.

tained by a stockholder, no matter what diligence he may have shown, after proceedings have been taken to liquidate the affairs of the corporation on the ground of its insolvency, inasmuch as the rights of creditors of the corporation, both as against the corporation and those who are registered shareholders, then become superior to the rights to the defrauded shareholder. Stone v. Bank, 3 C. P. Div. 282, 307; Wright's Case, 7 Ch. App. 60; Kent v. Brickmaking Co., 3 Ch. App. 493; Thomp. Corp. §§ 1439, 1441; Cook, Stock & Stockh. § 163. In this country there are some cases in which a stockholder's right to rescind his subscription after the intervention of proceedings in bankruptcy, or after the insolvency of the corporation, has been denied; but, as Mr. Thompson well remarks in his Commentaries on the Law of Corporations (section 1449), it does not appear in any of the cases that the denial of the right to rescind was grounded exclusively on the fact that proceedings in bankruptcy had been instituted, or that the corporation had become insolvent. Farrar v. Walker, 3 Dill. 506, note, Fed. Cas. No. 4,679; Upton v. Tribilcock, 91 U. S. 45; Ogilvie v. Insurance Co., 22 How. 380, 391; Michener v. Payson, Fed. Cas. No. 9,525; Duffield v. Iron Works, 64 Mich. 293, 31 N. W. 310; Turner v. Insurance Co., 65 Ga. 649, 38 Am. Rep. 801; Ruggles v. Brock, 6 Hun (N. Y.) 164; Hurd v. Kelly, 78 N. Y. 588, 34 Am. Rep. 567; Howard v. Turner, 155 Pa. 349, 26 Atl. 753, 35 Am. St. Rep. 883.

In all of these cases the evidence showed that there had either been some lack of diligence on the part of the stockholder in discovering the fraud of which he complained, or unreasonable delay in asserting his rights after the discovery of the fraud, or active participation in the management of the corporation, or that debts had been contracted by the corporation subsequent to the subscription, which either gave to corporate creditors superior equitable rights, or estopped the shareholder, as against a corporate creditor, from asserting that he was not a shareholder. The question whether a stockholder should be permitted to rescind his subscription, on the ground of fraud, after the insolvency of the company, is attended with much doubt and difficulty, because of the peculiar relation which a shareholder sustains to the creditors of the company. In the case of Upton v. Englehart, 3 Dill. 496, 505, Fed. Cas. No. 16,800, Judge Dillon, while discussing this subject, pointed out that the unbending English rule above referred to was influenced in a measure by the companies act (25 & 26 Vict. c. 89), which makes provision for a "register of stockholders," to which the public have access, and that, as no similar register of stockholders is ordinarily kept in the United States, the English decisions holding that the commencement of a proceeding to wind up a company is in itself a bar to a suit for rescission are not strictly applicable to the conditions which prevail here. He concluded the discussion of the question as follows: "I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts, and thus drawn an innocent person into the purchase of stock,—he at the time being guilty of no want

of reasonable caution and judgment, and afterwards being guilty of no laches in discovering the fraud,—and he thereupon, without delay, notifies the company that he repudiates the contract, and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company, subsequently happening, will not enable the assignee to insist that the purchase of stock is binding upon him."

There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid,—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist, and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern. There is some force, doubtless, in the view which has sometimes been taken by eminent judges, that when a person has been inveigled into making a stock subscription by representations that were clearly false and fraudulent, he should be entitled to rescind his subscription, even after the insolvency of the company, under the same circumstances that would entitle him to rescind a contract of a different nature; that is to say, by proof of due diligence in discovering the fraud, and of prompt action after it was discovered. Upton v. Tribilcock, 91 U. S. 55, 56, 23 L. Ed. 203; Duffield v. Iron Works, 64 Mich. 293, 31 N. W. 310, 316. See, also, Improvement Co. v. Merrill, 2 U. S. App. 434, 2 C. C. A. 629, and 52 Fed. 77.

The case in hand, however, does not require us to go to that length, even if we felt so disposed, as the facts are peculiar and exceptional. In the present instance the fraud of the defendant bank, whereby the plaintiff, Newbegin, was induced to become a subscriber to its increased stock, is conceded. He lived a long distance from where the bank was located, and took no part, after becoming a stockholder, in the management of its affairs. He remained utterly ignorant of the fraud that

had been practiced until the defendant bank closed its doors for the first time, on November 25, 1890, whereupon he immediately repudiated his subscription, as having been induced by fraud, and gave notice to that effect both to the bank and to the other stockholders. * * *

The result is that the judgment of the circuit court must be, and it is hereby, affirmed.[61]

HARTFORD & N. H. R. CO. v. BOORMAN et al.

(Supreme Court of Connecticut, 1838. 12 Conn. 530.)

Suit brought against the defendants as assignees or purchasers of stock, who have received certificates of proprietorship from the plaintiffs, and have become stockholders in the company; and it was instituted to recover instalments required to be paid on their shares, after they became stockholders. The plaintiffs having obtained a verdict, pursuant to the direction of the judge, the defendants moved for a new trial for a misdirection.

HUNTINGTON, J. The reasons for our decision subjecting the original subscribers to personal liability, apply, with equal force, to those who become stockholders by purchase. The relation of stockholder and company exists. A privity between them is created. The charter provides, in the 2nd section, that the shares shall be transferable in such manner as the by-laws of the company direct; and it is admitted, that the defendants, on the 16th day of December, 1835, (which was before any of the sums now sought to be recovered, were required by the directors to be paid,) were, and ever since have been, the owners and holders of one hundred shares of the stock of the company originally subscribed, and by the subscribers to whom they were apportioned, duly transferred to the defendants, on the books of the company, and a certificate given at the request of the defendants, declaring that "they are entitled to one hundred shares in the capital stock of the Hartford and New Haven Railroad Company, on which five dollars on each share has been paid; the residue payable by instalments, as may be ordered by the board of directors. Said shares are transferable on the books of said company, at the Phœnix Bank in the city of Hartford, by J. Boorman and H. Hudson, or their attorney, on the surrender of this certificate." The case already decided

[61] See Turner v. Grangers' Life & Health Ins. Co., 65 Ga. 649, 38 Am. Rep. 801 (1880); Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591 (1896).

In Gress v. Knight, 135 Ga. 60, 68 S. E. 834, 31 L. R. A. (N. S.) 900 (1910), Lumpkin, J., speaking for the court, said: "As to creditors whose claims arose after the stockholders became such, their rights are superior to any right of rescission. The status of a stockholder relative to creditors, who became such after he took the stock, is not in all respects identical with that relative to antecedent creditors. As to creditors whose debts were created before he took the stock, questions of laches, acts inconsistent with rescission, estoppel, etc., might arise."

must, therefore, govern this; and as to the instalments sought to be recovered in this action, we apply the just rule stated by the court in the case of the Huddersfield Canal Company v. Buckley, 7 Term Rep. 36, that "after assignment, the assignees hold the shares on the same conditions, and are subject to the same rules and orders as the original subscribers, and are" (for all the purposes of the present case) "substituted in the places of original subscribers." Bend v. Susquehannah Bridge & Bank Co., 6 Har. & J. (Md.) 128, 14 Am. Dec. 261.

We take occasion to remark, that no questions have been discussed before us, in either of the cases, upon whom the liability rests to pay instalments required by the directors, upon stock then owned by one person, but which subsequent to such requisition, and before the same become due, is, by him, bona fide transferred to another; nor regarding the effect of transfers by stockholders, to known bankrupts, with the view of terminating their liability for future instalments; nor touching the operation of transfers, by way of mortgage or hypothecation, with reference to any supposed liability, on the part of the mortgagee, for instalments which are ordered while he holds them in pledge. And we give no opinion upon either of these points. They are not embraced in the cases before us; and the expression of an opinion would be both unnecessary and improper.

The instruction to the jury was right in the present case; and a new trial is not advised.

In this opinion the other Judges concurred. See Ward v. Griswoldville Mfg. Co., 16 Conn. 598; Mann v. Cooke, 20 Conn. 183, 187. New trial not to be granted.

In re MEXICAN & SOUTH AMERICAN CO.
DE PASS' CASE.

(Court of Appeal in Chancery, 1859. 4 De Gex & J. 544.)

Appeal from an order of the Master of the Rolls by which the appellants De Pass were placed or retained on the list of contributories as the holders of 250 shares in the company.[52]

Lord Justice TURNER. Then, as to the case of the Messrs. De Pass. They are put upon the list for 250 shares which were formerly held by them, and for which they had paid £1,750. Their case is, that on the 8th of November, 1857, sixteen days before the date of the winding-up order, they delivered over these shares to Mr. Spencer, one of the clerks, in consideration of the sum of £1. paid by him to them. It sufficiently appears, I think, from the evidence, that at this time they were aware, or at all events had good reason to suspect, that the company was in difficulties. It was, indeed, admitted in the reply that their object was to get rid of their liability, and it was insisted

[52] Statement of facts abridged, and Grisewood & Smith's case omitted.

that they were entitled to do so. I agree that they were, for I cannot see what equity there could be on the part of the other shareholders to insist upon their retaining the shares. The question, therefore, as to these Appellants seems to be, whether they did or did not on the 8th of November, 1857, bona fide part with these shares out and out. I had much doubt upon this point when the case was argued, more especially from the fact that even at a later date the shares appear to have been sold in the market at a price which would have yielded more than was paid for them to the Appellants by their clerk, but I have since read and considered the evidence more carefully, and I am satisfied that we can come to no other conclusion upon it than that these shares were on the 8th of November, 1857, absolutely and bona fide parted with by the Appellants out and out, without any trust for their benefit, or any reservation whatever; and I am of opinion, therefore, that this order must be discharged, and the names of these gentlemen removed from the list. I think, however, that the transaction was one requiring the most searching investigation, and that there should be no costs to the Appellants of any part of the proceedings.

Lord Justice KNIGHT BRUCE, concurred.[53]

PULLMAN v. UPTON.

(Supreme Court of the United States, 1877. 96 U. S. 328, 24 L. Ed. 818.)

One Myers owned twenty-five shares of stock in the Great Western Insurance Company whereon twenty per cent. had been paid and being indebted to Pullman, assigned them to him as collateral security. Pullman caused the stock to be transferred to him on the books of the company. The company became bankrupt in February, 1872. The present suit was brought by Upton, the assignee in bankruptcy, to recover the balance remaining unpaid upon the stock. The judgment of the trial court in favor of the plaintiff is brought on writ of error to this court; one of the questions presented being the liability of Pullman for the unpaid assessments.[54]

STRONG, J.[55] * * * The only question remaining is, whether an assignee of corporate stock, who has caused it to be transferred to himself on the books of the company, and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company, or to the creditors of the company, after it has become bankrupt.

[53] Compare Nathan v. Whitlock, 9 Paige (N. Y.) 152 (1841); In re Mexican & South American Co. (Costello's Case) 2 De G., F. & J. 302 (1860); In re Imperial Mer. Credit Ass'n (Payne's Case) 9 L. R. Eq. Cas. 223 (1869).

[54] Statement of facts substituted.

[55] A part of the opinion is omitted.

That the original holders and the transferees of the stock are thus liable we held in Upton v. Trebilcock, 91 U. S. 45, 23 L. Ed. 203, Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220, and Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; and the reasons that controlled our judgment in those cases are of equal force in the present. The creditors of the bankrupt company are entitled to the whole capital of the bankrupt, as a fund for the payment of the debts due them. This they cannot have, if the transferee of the shares is not responsible for whatever remains unpaid upon his shares; for by the transfer on the books of the corporation the former owner is discharged. It makes no difference that the legal owner—that is, the one in whose name the stock stands on the books of the corporation—is in fact only, as between himself and his debtor, a holder for security of the debt, or even that he has no beneficial interest therein. This was ruled in Newry, etc., Railway Co. v. Moss, 14 Beav. 64. In that case, it was said that only those persons who appear to be shareholders on the register of the company are liable to pay calls. In Re Phœnix Life Insurance Co., Hoare's Case, 2 John. & H. 229, it appeared that certain shares had been settled upon Hoare and others, as trustees in a marriage settlement. The trustees had no beneficial interest, but they were registered as shareholders, and the word "trustees" added in the margin of the register, and they receipted for dividends as trustees. It was held by Vice-Chancellor Wood that they were liable as contributories to the full extent, and not merely to the extent of the trust estate. It was said, "A person who is a shareholder is absolutely liable, although he may be bound to apply the proceeds of the shares upon a trust." In Empire City Bank, 8 Abb. Prac. (N. Y.) 192, reported also in 18 N. Y. 200, the Court of Appeals held persons responsible as stockholders in respect to the stock standing in their names on the books of the bank, though they held the stock only by way of hypothecation as collateral security for money loaned, and they were held liable for an amount equal to their stock for the unsatisfied debts of the bank. In Adderly v. Storm, 6 Hill (N. Y.) 624, it appeared that one Bush, in 1837, being indebted to the defendants, transferred to them, on the books of a company, certain shares of stock, and delivered to them the usual certificates. On receiving the certificates, the defendants gave Bush a receipt, stating they had received the stock, which they were to dispose of at any time for $200 per share, applying the proceeds to the payment of the notes which Bush owed them, or, if not sold when the notes should be paid, to return the scrip to Bush, or account for it. The last of the notes was paid in September, 1838, and the defendants returned the scrip to Bush, giving also a power of attorney for the transfer of the stock. The retransfer was not made, however, until March 2, 1840, and the defendants were held liable, as stockholders, for a debt of the company contracted in January, 1840; and this, it was said, would be the law, though the plaintiff may not have known, at the time he trusted the company, that the defendants could be reach-

ed. So, in Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183, it was decided that a transfer of stock on the books of the bank, intended merely to be held as collateral security, makes the holder liable for the bank debts. It was said, the creditor is to be considered the absolute owner, and that his arrangement with his debtor cannot change the character of the ownership. And in Wheelock v. Kost et al., 77 Ill. 296, the doctrine was asserted, that when shares of stock in a banking corporation have been hypothecated, and placed in the hands of the transferee, he will be subjected to all the liabilities of ordinary owners, for the reason that the property is in his name, and the legal ownership appears to be in him.

These decisions are sufficient to vindicate the judgment of the court below. The case of the plaintiff in error is a hard one, but he cannot be relieved consistently with due observance of well-established law. Judgment affirmed.

In re ALMADA & TIRITO CO.

(Court of Appeal, 1888. L. R. 38 Ch. Div. 415.)

The company was organized under the companies act of 1862, with a capital of £210,000. in 210,000 shares of £1. each. Under a resolution to increase the capital of the company, an agreement was made between the company and the subscribers to the new issue by the terms of which, the shares were to be issued and held as shares of £1. each, with 18s. per share credited as paid thereon, making with the deposit of 1s. per share, the sum of 19s. paid up on each share. No certificates have been issued. On January 24, 1888, Allen, one of the subscribers moved before Mr. Justice Chitty, under the 35th section of the Companies Act that the register of members of the company might be rectified by striking out his name, and that the money paid on his shares might be returned to him; the ground of application being that the issue of shares at a discount was ultra vires and void. Mr. Justice Chitty dismissed the application with costs.[56]

COTTON, L. J.[57] This is an appeal from a decision of Mr. Justice Chitty, who really did not decide the question in this case, but merely in accordance with previous decisions of his made an order and sent the parties here.

This question is this: The directors and shareholders of this company determined that there should be an increase of capital of £1. shares, but that they should be issued on this footing—that 18s. should be credited as paid, and that those who took the shares should only be liable to pay 2s. That was in accordance with resolutions which were passed by the company, and there was an offer of shares to Mr. Allen

[56] Statement of facts substituted.

[57] A part of the opinion dealing with the Companies Act is omitted.

and others, who have accepted those shares. Is that right? Were the directors in a position to give the shares which they offered to their shareholders, and which some of the shareholders have accepted? In my opinion, they could not do so, because it is really saying that these shares, which are £1. shares, shall be taken on the footing of 2s. only being payable. That, it appears to me, is quite wrong. I decide it on the provisions of the Act of 1862, also taking into consideration the Act of 1867, on which the counsel for the company have relied. When we look at the Act of 1862, we find that that is an Act giving limited liability; and on what terms does it give limited liability? There is to be a memorandum of association, and there are to be articles of association. I will assume that here there is that which is equivalent to an article of association, enabling the company to do what has been proposed to be done. In my opinion that could not effectively be done, in order to protect anyone who held shares, and who had only paid in accordance with that article 2s. from being called upon at some future time, if this company is wound up, to pay 18s. more.

Let us look at section 7 of the Act of 1862. "The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up." Of course, I need not consider the latter part of that, because it applies to companies of a different description. This was a company limited by shares, and we shall find presently the number of shares and the amount of the shares is to be defined by the memorandum of association, and the liability of the members depends in such a company on the question of what amount they had paid on the shares, having regard to the amount fixed by the memorandum. Then we come to the next section, section 8: "Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things": These are, shortly, the name of the proposed company; the part of the kingdom in which its registered office is; the objects for which it is established; a declaration that the liability of the members is limited; the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount.

Now, going on those two sections only, this being a company to be limited by shares, the memorandum of association is to define how many shares there are to be and what is the fixed amount—that is the amount fixed by money—of each of those shares; and everyone is liable for so much of that amount fixed by the memorandum as it can be shewn he has not paid. Then is there any power to alter in that respect the memorandum of association? This is shewn in section 12, and there we find how, and how only, the memorandum can be varied: "Any

company limited by shares may so far modify the conditions contained in the memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of a larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association;" that is to say, it cannot diminish the quantum of its shares, the money amount of its shares, and it cannot limit the liability to pay that amount so as to limit the liability of each shareholder and protect him against being called upon to pay what under the 7th section he is liable to pay in the event of the company being wound up.

We must remember we are dealing with a case where liability is imposed on persons who join in these companies, but where a limit is placed on the liability which they otherwise would have incurred if this Act had not been passed. I do not, of course, refer to the power given by a subsequent Act to reduce the amount of capital, which has not been followed here, but in my opinion, looking to those sections of the Act of 1862 only, it is perfectly clear that an agreement that you should pay 2s. on the shares you take, and not pay up the other 18s., which would make up the amount in money fixed by the memorandum of association, would be entirely ultra vires. It has been held that no company can return to its shareholders any of the money which they have paid, and in my opinion, without relying upon the fact that this is in substance returning the money as if it had been paid and then paid back again, there is no power to limit the liability of the shareholders to pay the amount unpaid on their shares. In my opinion it is tolerably clear here that the terms offered to the shareholders were, not that the 18s. should be treated as paid in a particular way, but that the 18s. should not be paid just the same as if there had been a release given by the company for 18s. of the amount (Mr. Beale calls it the nominal amount, but I call it the amount) fixed in accordance with the Act of Parliament by the memorandum of association. So far therefore, I think it is clear that the company and the directors could not issue shares such as they proposed to issue in this case. * * *

The result therefore must be that, as the company has put these gentlemen on the list of shareholders, and they did nothing which in any way was an assent to that being done, the contract being one which the company could not carry into effect, we must make an order that their names be removed from the register. There is no question raised as the return of the 1s. they have paid. We might probably direct payment of such damages as we may think right; but there being no question raised on that point, the order will be to take them

off the register of shareholders, and to return to each of them the 1s. per share which they have paid.

FRY, L. J. I am of the same opinion, and I find myself quite unable to agree in the decision of the learned Judge. The question which we have to solve is, I think, simply and shortly answered by a reference to this inquiry—What is the nature of an agreement to take a share in a limited company? In my opinion it is an agreement to become liable to pay to the company the amount for which that share has been created. Further, it appears to me to be clear that the liability of the shareholders is limited only by the amount unpaid on the shares.

Now observe, it is the amount unpaid; it is not the amount remaining due. The result is that a release by the company will not diminish the liability—accord and satisfaction between the company and the shareholder will not diminish the liability; nothing will diminish or extinguish that liability but payment. The consequence is that we are driven to this second short inquiry, Is an agreement to take 2s. for 20s. a payment of 18s? I say it is not. That appears to me to be the whole matter.

Then a supplemental question is raised in this way: it is said that however it stood under the Act of 1862, the result is altered by the 25th section of the Act of 1867. That section is in these words: [His Lordship read the section.] What the exact words to which "the same" refer may be, it is a little difficult to ascertain; but I think the view suggested by Mr. Phipson Beale is the true one—that it means unless terms of payment otherwise have been determined.

Then we come to the inquiry: Is an agreement to take 2s. for 20s. a term or mode of paying 18s? I have already said that in my judgment it is not a payment of 18s. It, therefore, cannot be a term of mode of payment. Consequently the registration of this agreement, which is an agreement in effect to release the 18s., is entirely inoperative under the 25th section of the Act of 1867. When we have determined this question the rest of the matter is arranged between the parties. Mr. Beale has, I think very properly, not thought fit to argue whether such a contract as this, entered into under a common mistake of law, is or is not capable of being rescinded, or whether the 1s. can be claimed as damages. It has been agreed between the parties that the result of this application is to depend upon our decision as to the real nature of the contract.[58]

[58] The concurring opinion of Lord Justice Lopes is omitted.
Compare Ooregum Gold Mining Co. v. Roper, L. R. [1892] A. C. 125; Welton v. Saffery, L. R. [1897] A. C. 299.

COIT v. NORTH CAROLINA GOLD AMALGAMATING CO. et al.

(Supreme Court of the United States, 1886. 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420.)

FIELD, J.[59] The defendant the North Carolina Gold Amalgamating Company was incorporated, under the laws of North Carolina, on the thirtieth of January, 1874, for the purpose, among other things, of working, milling, smelting, reducing, and assaying ores and metals, with the power to purchase such property, real and personal, as might be necessary in its business, and to mortgage or sell the same.

The plaintiff is the holder of a judgment against the company for $5,489, recovered in the court of common pleas of Philadelphia on the eighteenth of May, 1879, upon its two drafts, one dated June 1, 1874, and the other August 15, 1874, each payable four months after its date. Unable to obtain satisfaction of this judgment upon execution, and finding that the company was insolvent, the plaintiff brought this suit to compel the stockholders to pay what he claims to be due and unpaid on the shares of the capital stock held by them; alleging that he had frequently applied to the officers of the company to institute a suit for that purpose, but that, under various pretenses, they refused to take any action in the premises.

By its charter the minimum capital stock was fixed at $100,000, divided into 1,000 shares, of $100 each, with power to increase it, from time to time, by a majority vote of the stockholders, to two million and a half of dollars. The charter provided that the subscription to the capital stock might be paid "in such installments, in such manner, and in such property, real and personal," as a majority of the corporators might determine, and that the stockholders should not be liable for any loss or damages, or be responsible, beyond the assets of the company.

Previously to the charter, the corporators had been engaged in mining operations, conducting their business under the name and title which they took as a corporation. Upon obtaining the charter the capital stock was paid by the property of the former association, which was estimated to be of the value of $100,000, the shares being divided among the stockholders in proportion to their respective interests in the property. Each stockholder placed his estimate upon the property, and the average estimate amounted to $137,500. This sum they reduced to $100,000, inasmuch as the capital stock was to be of that amount.

The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value, averring that the property consisted only of a machine for crushing ores, the right to

[59] A part of the opinion is omitted.

use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value, and therefore that the capital stock issued thereon was not fully paid, or paid to any substantial extent; and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscription.

If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. Boynton v. Hatch, 47 N. Y. 225; Van Cott v. Van Brunt, 82 N. Y. 535; Carr v. Le Fevre, 27 Pa. 413.

But the allegation of intentional and fraudulent undervaluation of the property is not sustained by the evidence. The patent and the machinery had been used by the corporators in their business, which was continued under the charter. They were immediately serviceable, and therefore had to the company a present value. The corporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item, the value of the chartered privileges, which is at all liable to any legal objection. But, if that were deducted, the remaining amount would be so near to the aggregate capital that no implication could be raised against the entire good faith of the parties in the transaction. * * * Judgment affirmed.[60]

[60] See See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843 (1905); In re Wragg, Ltd., L. R. 1897, 1 Ch. 796; Young v. Erie Iron Co., 65 Mich. 111, 31 N. W. 814 (1887); In re South Mountain Mining Co. (D. C.) 5 Fed. 403 (1881), same case on appeal (C. C.) 14 Fed. 347 (1882); Schenck v. Andrews, 57 N. Y. 133 (1874); Van Cleve et al. v. Bretelle, 143 Mo. 109, 44 S. W. 743 (1898).
Compare Taylor v. Cummings, 127 Fed. 108, 62 C. C. A. 108 (1903).

CLARK v. BEVER.

(Supreme Court of the United States, 1891. 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88.)

In 1872 the Burlington, Cedar Rapids & Minnesota Railway Company, being indebted to the Northern Construction Company in the sum of $70,000, issued directly to the members of the latter company thirty-five hundred shares of its stock of the par value of $100 per share, at twenty cents on the dollar; the stock being received in full satisfaction of the debt. The intestate, Greene, at the time president of the Railway Company and a member of the Construction Company, received 910 shares as his portion of the stock so delivered. The evidence shows that the stock was without value; that the Construction Company was reluctant to take the stock and demanded cash. The good faith of all parties concerned is not questioned. What the original stockholders paid for their stock does not appear. At the time of this transfer the Railway Company was without means to pay its floating debt or the interest on the bonded debt. Its revenues were not sufficient to pay interest charges. In 1875 foreclosure proceedings were instituted, and in July, 1876, a sale of the property of the Railway Company under a decree of foreclosure was made to the Burlington, Cedar Rapids & Northern Railway Company.

Clark, the plaintiff below, was the holder of fifty gold bonds of the original company, secured by a mortgage on the net income and rolling stock of the company. In a suit on these bonds instituted in 1878, Clark obtained a judgment against the Railroad Company for $65,517. A nulla bona return was made on an execution issued under this judgment in August 1880.

The present action was commenced against the administrator of Greene to recover the eighty per cent. alleged to be due and unpaid on the stock received by Greene as in the settlement with the Construction Company. The case was subsequently removed upon petition of Clark to the Circuit Court of the United States for the District of Iowa and transferred by consent to the Eastern Division of the Southern District of that state. The trial court held as a matter of law that the intestate, Greene, by taking the stock did not become liable to pay anything further on account thereof to the creditors of the railroad company, and pursuant to direction the jury returned a verdict for the defendant.[61]

HARLAN, J.[62] [After discussing the question of jurisdiction and the Iowa statutes, the court proceeds:]

Do the decisions of this court require us to hold, in such a case, that a creditor taking stock in payment of his claim is bound to other creditors for the face value of the stock? The plaintiff contends that our

[61] Statement of facts substituted.

[62] A part of the opinion is omitted.

decisions are to that effect. Let us see. In Sawyer v. Hoag, 17 Wall. 610, 620, 21 L. Ed. 731, it was held that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund sub modo for the benefit of its general creditors. And this principle was reaffirmed in Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523; Morgan Co. v. Allen, 103 U. S. 498, 26 L. Ed. 498; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Hawkins v. Glenn, 131 U. S. 319, 335, 9 Sup. Ct. 739, 33 L. Ed. 184, and Richardson v. Green, 133 U. S. 30, 45, 10 Sup. Ct. 280, 33 L. Ed. 516. There is no dispute here as to the soundness of this general principle. The dispute is as to its application to a case like the present one. We can be aided in solving this inquiry by ascertaining the character of the particular cases in which it has been applied by this court.

In Sawyer v. Hoag, a subscription of $5,000 to the stock of an insurance company for which the subscriber paid in full, but received in return the check of the corporation for $4,250 under an agreement that the debt for the stock should be extinguished, and the amount of the check should be treated simply as a loan of money to the stockholder, was held to be a mere device to evade the rule that unpaid subscriptions of stock constitute a trust fund for the benefit of the creditors of the corporation; consequently, that the stock there in question was to be regarded, as between the corporation and creditors, to be unpaid to the extent of the amount received back from the corporation under the pretense of a loan. In Upton v. Tribilcock, an actual subscriber to the stock of an insurance company upon which he agreed to pay 20 per cent., was held responsible for the balance, and could not escape liability therefor, because of representations by the agent, at the time of the subscription, that he would be only responsible for that amount, or by proving a subsequent arrangement with the company canceling the subscription and accepting, as in full payment, his note for the 20 per cent. agreed to be paid. Sanger v. Upton was another case of the actual subscription of stock upon which the subscriber was held to pay the full sum subscribed. In Webster v. Upton a person holding certificates of stock by transfer from the original subscriber, and standing upon the books of the corporation as a stockholder, was held liable for the balance due upon the stock, without proof of an "express" promise upon his part to pay. In Chubb v. Upton the decision was that one receiving a certificate of stock for a certain number of shares, at a given sum per share, thereby became liable to pay the amount thereof when called upon by the corporation or its assignee in bankruptcy; and in Pullman v. Upton, that a transferee of stock who caused the transfer to be made to himself, as collateral security for a debt of the transferrer, was liable for the balance due on such stock. The doctrine of the latter case was approved in Hawkins v. Glenn. In Morgan Co. v. Allen it was

decided that the subscription by a county to the capital stock of a railroad company, together with the bonds given therefor, constituted with other property of the company a trust fund, to which all its creditors could rightfully look for satisfaction of their claims; and that by no device or combination, to which particular creditors were parties, could it withdraw its bonds from that fund, and thereby avoid liability to the general creditors of the company. In Scovill v. Thayer it was declared, among other things, that a contract between a corporation and its stockholders, that they should never be called upon to pay any other assessment than that paid at the outset, while good as between the corporation and the stockholders, was a fraud in law upon creditors, which they could have set aside whenever their rights intervened and their claims were unsatisfied. In Richardson v. Green it was held that the issuing by a corporation of bonus stock was in violation of a statute of the state declaring it to be unlawful to issue certificates of stock until the shares were fully paid, and that one exercising the privileges and powers of a stockholder in a corporation was not exempt from the liabilities attaching to a bona fide stockholder who took shares purporting to be, but which in fact were not, fully paid.

This detailed statement of the above cases has been made because of the confident assertion that they rest upon doctrines necessarily requiring the reversal of the judgment. We do not concur in this view. In all of these cases, except one, there was an actual subscription of a given amount. They were cases of promises to pay the company the amount subscribed, not of sales by it. According to those cases, a stockholder, becoming such by formal subscription or by transfer upon the books of the corporation, cannot be discharged to the injury of creditors by any agreement, arrangement, or device to which creditors do not give their assent, and by which the stockholder is to pay less than the amount due upon such stock; this, upon the ground stated in Webster v. Upton, that "neither the stockholders nor their agents, the directors, can rightfully withhold any portion of the stock from the reach of those who have lawful claims against the company," and that "the stock thus held in trust is the whole stock, not merely that percentage of it which has been called in and paid." The present case presents features that are not to be found in the others. It is not the case of an ordinary subscription of stock in a given amount. Nor is it, strictly, one of an ordinary purchase of stock for purposes of investment. It is the case of a creditor of an insolvent railroad corporation which, in consequence of its inability to pay creditors in money, was threatened with bankruptcy, and which refused or was unable to pay except in stock that was without market value. To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value—there being no statute forbidding such a transaction —without subjecting the creditor, surrendering his debt, to the lia-

bility attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property. We do not think the statute of Iowa can be properly construed to cause such a result in respect to corporations organized under its laws.

We must not be understood as modifying in any respect the principles laid down in the cases above cited, nor the salutary rule laid down in Sawyer v. Hoag, that when the interest of the public or of strangers is to be affected by any transaction between the stockholders owning the corporation and the corporation itself, "such transaction should be subject to a rigid scrutiny, and, if found to be infected with anything unfair towards such third person calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him." These principles were reaffirmed in Richardson v. Green, and should not be relaxed in any case in which they may be applied consistently with justice. So, when the interest of creditors require, those who hold shares of stock in a corporation, purporting to be, but which are shown not to have been, paid for to the extent of their face value, should be held liable to pay for such shares in full, unless it appears that they acquired the stock under circumstances that did not give creditors and other stockholders just ground for complaint. As said by this court in Peters v. Bain, 133 U. S. 670, 691, 10 Sup. Ct. 354, 33 L. Ed. 696, "unpaid subscriptions to stocks are assets, and have frequently been treated by courts of equity as if impressed with a trust sub modo, in the sense that neither the stockholders nor the corporations can misappropriate such subscriptions so far as creditors are concerned." See, also, Graham v. Railroad Co., 102 U. S. 148, 161, 26 L. Ed. 106; Railroad Co. v. Ham, 114 U. S. 587, 594, 5 Sup. Ct. 1081, 29 L. Ed. 235; Fogg v. Blair, 133 U. S. 534, 541, 10 Sup. Ct. 338, 33 L. Ed. 721. * * *

The judgment below, in our opinion, is in accordance with the law as it was adjudged to be when Greene received the stock in question and surrendered his claim upon the railroad company, and with the law as this court has since that time frequently declared it to be; and our duty is to so declare in the case before us. Judgment affirmed.

BROWN, J., not having been a member of the court when this case was argued, did not participate in its decision.[68]

[68] Compare Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227 (1891); Flinn v. Bagley (D. C.) 7 Fed. 785 (1881); Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429 (1887); Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143 (1902).

DOWNER v. UNION LAND CO. OF ST. PAUL.

(Supreme Court of Minnesota, 1911. 113 Minn. 410, 129 N. W. 777.)

Action in the district court for Ramsey county to recover from defendant land company and its stockholders the balance of plaintiff's judgment, amounting to $3,955.96, with interest; that the agreement by which 17,000 shares of defendant land company were issued as full-paid stock be adjudged fraudulent and void as to plaintiff; that the court ascertain the true value of the land conveyed to the company in exchange for the stock and the percentage of overvaluation at which the land was so taken; and that plaintiff recover from each of defendants other than the Union Land Company the difference between the par value of the shares of stock owned by each, respectively, and the respective amounts actually paid thereon, taking the land at its true valuation, or so much thereof as may be required to pay the amount adjudged to be due plaintiff. The facts are stated in the opinion. From an order, Hallam, J., overruling plaintiff's demurrer to that part of the answer of Ferdinand Willius set out for and numbered as a second defense, plaintiff appealed.

START, C. J.[64] This is an appeal by the plaintiff from an order of the district court of the county of Ramsey overruling his demurrer to the second alleged defense in the answer of the defendant Willius.

The action was commenced in December, 1909. The here material allegations of the complaint, briefly stated, are to the effect following: The defendant Union Land Company, hereafter referred to as the company, is and has been since 1887 a corporation for pecuniary profit duly organized under the laws of this state. On April 5, 1887, it issued 17,000 shares of its capital stock, of the par value of $100 each, as full paid to its organizers, of which 50 shares were delivered to the defendant Willius, hereafter referred to as the defendant. The company, after such issue of stock, became indebted in the sum of $98,000, and thereafter, for the purpose of securing the money to pay such indebtedness, it issued its bonds, amounting in the aggregate to $126,000, with 10 per cent. annual interest, payable to trustees or bearer February 1, 1894. The plaintiff purchased 6 of such bonds, each for $500, and paid therefor $3,000, relying upon the representation that the 17,000 shares of stock so issued had been paid for in full. None of his bonds, or any part thereof, were paid, except interest to August 1, 1895. He recovered a judgment against the company in the district court of the county of Ramsey, on February 5, 1902, for the amount due on the bonds, $4,979.83. Execution was issued on the judgment and returned satisfied only to the extent of $1,023.87. The balance of the judgment has never been paid and the company is insolvent. The organizers and stockholders of the company, including

[64] A part of the opinion is omitted.

the defendant, with the intent of acquiring the 17,000 shares of stock as full paid, when in fact they were not, purchased 1,476 acres of land, for which they paid only $679,289, which was more than it was worth. They caused this land, with cash sufficient to make the price actually paid for the stock not more than $850,000, to be transferred and turned over to the company in payment of the 17,000 shares of stock, an overvaluation of the land of more than $790,000. Such valuation was not the result of mistake, but was a gross overvaluation, intentionally made by all the parties to the transaction, with the knowledge of all the past and present stockholders of the company, and with the intent to enable such stockholders to acquire, and they did thereby acquire, each his respective portion of the 17,000 shares of the capital stock, by paying to the company therefor not to exceed $50 per share. The 17,000 shares so issued are the only portion of the authorized capital stock of the company which was ever issued. The plaintiff did not discover the fraudulent character of the issue of the 17,000 shares, and was unable with due diligence to discover the same, until the summer of 1906, and such discovery was then for the first time made after several years of diligent inquiry. The complaint then alleges in detail the steps taken by the plaintiff to ascertain the facts as to the issue of such stock. The complaint prays, in effect, judgment against the company for the amount due on the original judgment, and that each of the defendant stockholders be required to pay so much of the difference between the par value of his stock and the amount actually paid by him therefor as may be necessary to pay the judgment against the company, and for general relief.

The answer of the defendant avers four alleged defenses, viz.: (1) The stock was in fact fully paid. (2) The plaintiff's bonds contained an express agreement that the stockholders should in no wise be liable for their payment. (3) The action is barred by the statute of limitations. (4) Laches.

The plaintiff replied to all the alleged defenses, except the second, to which he demurred. The trial court overruled the demurrer. The second alleged defense was to the effect: That the bonds of the company drew interest from their date at the rate of 10 per cent. per annum, and their payment was secured by a trust deed of all of the corporate property. That each purchaser of the bonds, including the plaintiff, entered into an agreement with the company, in consideration of the high rate of interest and the provision for the payment of the bonds, which was included in the body of each bond in these words: "It is a condition of the issue of this bond and the execution of said trust deed that this bond is an obligation of said company only" (meaning said defendant land company) "and that the stockholders of said company shall not, nor shall any of them, be in any wise liable for the payment thereof, nor shall any holder of this bond be entitled to any remedy to enforce payment thereof against any stockholder. The holder of this bond accepts this condition and

agrees to the terms thereof." And further, that no representations were ever made to the plaintiff that the shares of stock issued by the company were fully paid, or to any extent, except such representations as may be deemed to have arisen from the mere fact that 17,000 shares had been issued as fully paid, of which 12,132 shares were outstanding when the plaintiff purchased his bonds. * * *

2. The pivotal question presented by the record is whether the contract as to stockholders' liability contained in the bonds is a defense on the merits to this action. The demurrer admits the execution of the contract, the consideration therefor, and, therefore, its validity. Counsel for defendant contend that such contract is an absolute bar to this action, and cite in support of the claim, with others, the case of Brown v. Eastern Slate Co. et al., 134 Mass. 590, which was an action to enforce the statutory liability of the defendant stockholders for the payment of certain promissory notes of the company. The statute (Pub. St. Mass. 1882, c. 106, § 61) provided that stockholders who had not paid in full the par value of their shares should be jointly and severally liable for the debts of the company. The notes were delivered upon a contemporaneous agreement that there should be no personal liability on the notes. It was held that, as no one was personally liable, except by statute, the contract necessarily referred to the statutory liability, and that it was a defense.

Another case relied on is U. S. v. Stanford, 161 U. S. 412, 16 Sup. Ct. 576, 40 L. Ed. 751. In this case it was sought to enforce against the estate of Leland Stanford a claim of some $15,000,000 based upon the Constitution and laws of California, making each stockholder of a railroad corporation liable for its debts in proportion to the stock held by him. It was held that the liability of stockholders of corporations for bonds issued under the Pacific Railroad acts depended, not upon the laws of California, but upon the acts of Congress under which such bonds were issued, which provided that the stockholders should not be personally liable for the debts of the corporation.

The case of Basshor v. Forbes, 36 Md. 154, also cited, was an action to recover from a stockholder of a corporation the amount of its promissory note by virtue of a statute providing that stockholders should be liable for the debts of a corporation to an amount equal to that of their stock "until the whole amount of the capital stock fixed and limited by the corporation shall have been paid in full." Code Md. 1860, art. 26, § 52. It was held that an agreement, made at the time the note was delivered, that the payee should look only to the corporation and the security for its payment, was a defense.

These cases sustain the proposition that, if a person contracting with a corporation expressly agrees to look only to the corporation and its property for the payment of his debt against it, such agreement will be a waiver of the constitutional or statutory liability of stockholders for the payment of the debt. It is clear that the agreement contained in the bonds, which we have quoted, released the stockhold-

ers from any and all liability for the payment of the bonds imposed by the Constitution or statute, and from all liability whatever, in the absence of any element of fraud; that is, if they had then paid the full par value of their stock as represented by the issuance of it as full paid. This is not an action to enforce any constitutional or statutory liability of the defendant for the payment of the bonds; but it is, in effect, one to compel the defendants to make good, so far as may be necessary to satisfy the plaintiff's judgment against the corporation, their alleged representation, alleged to have been relied upon by him, that the assets of the corporation had been increased to the full par value of their stock, when in fact only one-half thereof had been paid.

The question, then, in its last analysis, is whether such a liability was within the contemplation of the parties when the bond agreement was made, and did the plaintiff thereby waive such liability in case he might thereafter discover for the first time the facts upon which liability must rest? The right of a creditor to maintain such an action is settled by the repeated decisions of this court. First National Bank v. Gustin, 42 Minn. 329, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; Hospes v. Northwestern Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; Hastings Malting Co. v. Iron Range Co., 65 Minn. 28, 67 N. W. 652; Wallace v. Carpenter Co., 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530.

The basis of the action is not contract, but fraud, for the reason that: People deal with the corporation and give it credit on the faith of its stock, and they have the right to assume that it has a paid-in capital to the amount which it represents itself as having. If the representation is false, it is a fraud on creditors; and, in case the corporation becomes insolvent, equity will compel the holders of bonus stock, or stock not in fact paid in full, to make the representation good, by paying the balance due on their stock to the extent necessary to pay creditors whose debts were contracted subsequent to the issuing of the stock as fully paid, and who are presumed to have relied on the representation. It is the misrepresentation of fact in stating the amount of capital to be greater than it is in fact which is the basis of the liability of the stockholders in such cases. A certificate for paid-up shares in a corporation is simply a written statement in the name of the corporation that the holder thereof is a stockholder, and that the full par value of his shares has been paid to the corporation. If the shares in fact have not been so paid for, the certificate that they have been is a false representation that the assets of the corporation have been increased to the amount of the par value of the stock so issued.

The very basis of this action clearly indicates that the alleged liability sought to be enforced in this action was not within the contemplation of the parties at the time the bond agreement was made, and that it was not waived thereby. How can the plaintiff be said to

have waived a liability, when he had no knowledge of the facts out of which the alleged fraud and consequent liability sprung? Is it reasonable to assume that the company or its stockholders intended by the agreement to guard against liability for fraud which from their viewpoint never existed and was not then claimed by any one? We hold that the agreement here in question does not constitute a waiver by the plaintiff of the alleged liability sought to be enforced by this action, nor a defense thereto.

It was alleged in the second defense, and admitted by the demurrer, that no representations were ever made to the plaintiff that the shares of stock were fully paid, except the fact that they were issued as fully paid; that he made no inquiries either as to the amount thereof, or the amount paid thereon; and that he had no information in regard thereto. It is urged, in effect, on behalf of the defendant, that in view of this admission the plaintiff did not rely on any representation that the stock was fully paid. We cannot concur in this view of the effect of the allegations referred to. The complaint expressly alleged that the plaintiff, relying upon the representation that the shares had been paid in full, purchased and paid for his bonds. This allegation is put in issue by the general denial contained in the first defense. The allegation in the second defense relied on is simply a statement of evidentiary facts relevant to the issue whether the plaintiff did in fact rely upon the representation as alleged in the complaint. It does not appear upon the face of the second defense that the plaintiff did not rely upon the representation.

With reference to a trial of this issue we deem it proper to say that the presumption of reliance by creditors upon the representation that stock issued as fully paid is so in fact is only prima facie. The rule in such cases is that: "It is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of 'bonus stock.'" Hospes v. Northwestern Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637.

It follows that the demurrer to the defense should have been sustained. Order reversed.

JAGGARD, J., took no part.[65]

BRANT v. EHLEN et al.

(Court of Appeals of Maryland, 1882. 59 Md. 1.)

The Virginia Coal & Iron Company was incorporated in 1865. Pursuant to a proposition made to the company by Ehlen on behalf of

[65] See Hospes v. Northwestern Mfg. Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637 (1892).
Compare Easton National Bank v. American Brick & Tile Co., 69 N. J. Eq. 326, 60 Atl. 54 (1905).

himself and other incorporators, the company purchased and took possession of a tract of coal land for $500,000; the purchase price being $25,000 in cash, and the balance $475,000 in the stock of the company. The stock was delivered. Subsequently the plaintiff, Brant, successfully pursued a claim of title to an undivided seven-eighths interest in said tract of land, and a decree was obtained for the sum of $328,042.99 on account of coal taken by the company. This suit is instituted to enforce payment against defendants as stockholders in the company.

The bill alleges that the company is insolvent and at least ninety per cent. of the shares held by the defendants remain unpaid. These shares were issued as fully paid, the certificates being in the ordinary form, with nothing on their face to indicate they are not full paid. They were purchased and held by the defendants, with the exception of Ehlen, as full-paid shares, with no notice of fraud or irregularity in their issue.[66]

ROBINSON, J.[67] * * * First. Whether as bona fide transferees of shares of stock issued by the company to the original subscribers as full-paid shares, and sold by them as such, the defendants are liable in an action by a creditor of the company for unpaid instalments on said shares, if it should turn out, that they were not in fact full-paid shares? * * *

Were it a question of first impression, we do not see on what grounds the liability of the defendants as bona fide transferees could be maintained. The liability for subscription to the stock of a corporation is founded on contract. Where one agrees to take a certain number of shares, the law implies a promise to pay for them according to the terms of his subscription. If they are sold before all the instalments are paid, and are bought with such knowledge, the law implies a promise on the part of the purchaser to pay whatever may be due thereon, according to the terms of the original subscription. In such cases the purchaser stands in the shoes of the original subscriber. These are elementary principles, about which there can be no contention. But where shares are issued by the company to the subscriber as full-paid shares, and are sold by the subscriber as such, there is no ground on which a promise can be implied on the part of the purchaser without notice, to be answerable either to the company or to its creditors, should the representations on the faith of which he purchased, prove to be false. He could not be held liable on the ground of contract, because he never agreed to purchase any other shares, than full-paid shares; and if it be said that the shares were fraudulently issued, he could not be held liable on the ground of fraud, because he was in no sense a party to the fraud. The company beyond all question could not under such circumstances, maintain an action against him, because

[66] Statement of facts substituted.

[67] A part of the opinion is omitted.

it would be estopped by its own acts and declarations. But the argument is, that independent of the relation of debtor and creditor between the stockholder and the company growing out of the contract of subscription, there is another relation which the subscriber sustains to the creditors upon the insolvency of the company. That as to them, the unpaid subscription constitutes a trust-fund, which is beyond the reach of any agreement between him and the company to divest or impair.

In speaking of the assets of an insolvent corporation, as constituting a trust-fund for the payment of creditors, it is necessary to understand precisely what is meant by the Courts. No one will pretend for a moment, that in subscribing to the stock of a company, the purpose is to create a trust-fund for creditors. On the contrary, the object primarily is to furnish means to carry on its business, and to share the profits earned by the corporation; and so long as it is a going concern, it has the right, and indeed it is its duty to manage and dispose of its assets, including stock subscriptions, for the promotion of its own interest. If it ceases to do business, or if it becomes insolvent, then all assets which it then has or owns, including paid and unpaid subscriptions, either in the hands of the original subscriber, or in the hands of his assignee with notice, become a trust-fund, for the payment of creditors, and they have the right to follow the property constituting this fund, and subject it to the payment of their debts, unless it has passed into the hands of a bona fide purchaser without notice. And further, if there has been any fraudulent or collusive disposition of the assets of the corporation, all who participate in the fraud may be held liable to the creditors.

In Sanger v. Upton, Assignee, 91 U. S. 60, 23 L. Ed. 220, where this doctrine of trust-fund is as strongly asserted as in any other case, the Court say, "The capital stock of an incorporated company is a fund set apart for the payment of its debts. If diverted the creditors may follow it so far as it can be traced, and subject it to the payment of their claims except as against holders who have taken it bona fide for a valuable consideration and without notice."

This is what the Courts mean in speaking of the assets of an insolvent corporation constituting a trust-fund for the payment of creditors, and as thus understood, it furnishes no ground on which the liability of the defendants as bona fide purchasers of stock, issued as full-paid, can be maintained, although such stock was not in fact full-paid. If this be so, on what other ground is the superior equity of the creditor based?

It was said, the purchaser ought to ascertain by inquiry, whether the stock issued by the company was in fact full-paid. It must be admitted, however, that this obligation rests with equal, if not greater, force on the creditor. He deals directly with the company, and has, it is fair to presume, greater means and facilities for ascertaining its

real condition, and its claims to confidence and credit, than the purchaser of stock which is sold on the market, and sold too in most instances, at a distance from the company's place of business. Shares of stock are not, strictly speaking, negotiable instruments, but Courts speak of them as quasi negotiable; and when they are issued as full-paid shares, and as such sold in open market, the purchaser is not bound to suspect fraud where everything seems fair and conformable to the requirements of the law. Any other doctrine would virtually destroy the transferable nature of such shares, and paralyze the whole of the dealings in the stock of corporations. Burkinshaw v. Nicholls, 26 W. R. House of Lords, 821.

Were this then a question to be decided on principle, we do not see on what grounds these defendants could be justly held liable to the creditors of the company. And such seems to be the whole current of decisions both in England and in this country. In Nicholls' Case, Court of Appeals, 26 Weekly Rep. 334, shares were issued by the company as full-paid shares, when in fact there was no payment in money, nor any registration of the contract of subscription, as required by the Companies' Act of 1867, and upon the winding up of the company, some of these shares were held by Nicholls, trustee, as transferee without notice that such shares had not been paid in money. Suit was brought by the official liquidator against Nichols for contribution, and the Court held that he was not liable. "When you have a receipt given you by the company or a final receipt as a certificate of payment," said Jessel, M. R., what more is a bona fide purchaser to ask for, and what occasion has he to make any further inquiry? "He has the representation of the company, by the certificate, that the shares are fully paid up. It appears to me impossible that the company should be allowed to say the shares were not paid up in due course." On appeal the judgment in this case was affirmed by the House of Lords, and in speaking of the rights of the defendant as a bona fide purchaser without notice, Lord Cairns said: "He receives a representation to the effect, that the law has been complied with, and, it would paralyze the whole trade in company's shares, if a person taking shares with a representation that they are fully paid up, must disregard this assertion, and satisfy himself of the fact by personal inquiry." And in Bush's Case, L. R. Ch. App. 555, where shares were allotted to Tucker, as full-paid shares, and by him transferred to the defendant as such, when in fact no money had been paid as required by the Companies' Act, the appeal was spoken of by Sir Wm. M. James, "as an idle and vexatious appeal." And in the still later case of Waterhouse v. Jamieson, Law Rep. 2 Scotch and Divorce App. 38, Lord Westbury said, "The appellant is a bona fide holder of shares, upon which, no doubt, there was a false statement made by the company, of which he had no knowledge, and as to which he was under no obligation to inquire,

and therefore cannot be subjected to liability by having imputed to him knowledge of the falsehood."

Against the force of these decisions it is argued that the English Courts accord to creditors of insolvent corporations such rights only as the official liquidator can assert in the name of the corporation, and through its contracts; and that the ground on which a bona fide purchaser of stock issued as full-paid is held not to be liable, although such stock was not in fact full-paid, is that the liquidator is estopped from denying the representation made by the company, upon the faith of which others have been induced to purchase the stock. In this country, however, it is said the Courts accord to creditors rights growing out of the relation of stockholder, which upon the insolvency of the corporation attach at once to unpaid shares, whether in the hands of the subscriber or his assignee, and that the inquiry here is not whether the holder took the stock in good faith believing it to have been paid up, but whether the stock has in fact been fully paid.

This distinction is not, we think, supported by the decided cases. On the contrary, all the decisions in this country agree that the right of the creditor to recover against the stockholder rests on the liability of the latter to the corporation, and that this liability is one founded on contract. Where shares of stock are issued to be paid in certain instalments, the law implies a promise on the part of the subscriber and his assignee, that they will pay whatever may be due thereon according to the terms of the subscription. But where shares are issued as fully paid, and these are sold in open market, and one buys them in good faith on the representation of the company that they are paid up no promise can be implied on the part of the purchasers to become liable if such shares have not in fact been paid. He is not bound to suspect fraud in issuing the stock, and the remedy of the creditor in such cases is against the parties to the fraud. In Foreman v. Bigelow, 4 Cliff. 509, Fed. Cas. No. 4,934, and Steacy v. Little Rock Railroad Co., 5 Dill. 348, Fed. Cas. No. 13,329, the whole subject was considered and the English doctrine was fully approved. In the one, Justice Clifford quotes with approval the opinions delivered by James, L. J., and Thesiger, L. J., in Nicholls' Case, and in the other, Justice Dillon relies on the opinions of Lords Cairns, Hatherley, Selborne and Blackburn, delivered in the same case on appeal to the House of Lords. And in all the cases relied on by the appellant as sustaining a contrary doctrine, it will be found either that the certificates on their face showed that the shares of stock were not in fact full-paid or the facts and circumstances accompanying the transfer, were such as to put the purchaser on inquiry. Upton, Assignee, v. Hansbrough, 3 Biss. 417, Fed. Cas. No. 16,801; Upton, Assignee, v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Boorman's Case, 12 Conn. 530; Bend v. Susquehanna

Bridge Co., 6 Har. & J. 128, 14 Am. Dec. 261; Hall v. U. S. Ins. Co., 5 Gill, 484; Palmer v. Laurence, 3 Sandf. (N. Y.) 161. * * * Decree affirmed.[68]

II. By Statute

CORNING et al. v. McCULLOUGH.

(Court of Appeals of New York, 1847. 1 N. Y. 47, 49 Am. Dec. 287.)

JONES, J.[69] Corning and Horner, the plaintiffs in error, made a sale of merchandise to the Rossie Galena Company, wherein the defendant in error was a stockholder, and after obtaining a judgment against the company for the amount thereof, and after an execution, issued on the said judgment, had been returned unsatisfied, brought this action against the defendant in error as being a stockholder and member of the company, and personally liable for the debt. The defendant pleaded in bar of the action that the cause of action did not accrue to the plaintiffs within three years next before the commencement of the suit. To this plea the plaintiffs demurred, and the Supreme Court gave judgment against them. That judgment is now before this court for review. The question is, whether the statute limitation of three years for the commencement of actions on statutes for a forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, or to such party and the people of the State applies to this case, and bars the plaintiffs' action. The Revised Statutes contain a general provision limiting the time to six years within which actions of account, assumpsit, or on the case, founded on any contract or liability, express or implied, are to be commenced, as expressed in the 4th subdivision of section 18 of the 2d article of title 2d of the chapter entitled, "of actions and the times of commencing them," which the plaintiffs suppose to apply to this action. And those statutes also contain a special provision declaring that all actions upon any statute, made or to be made for any forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, or to such party and the people of this State, shall be commenced within three years after the offense committed, or the cause of action accrued, and not after, as expressed in section 31, in the 3d article of said title and chapter; and within this provision the defendant claims the present suit to come. To which of these classes does this action properly belong? * * *

The ground of the action is the individual liability of the defendant to pay for merchandise sold and delivered to a company of which he

[68] See Waterhouse v. Jamieson, L. R. 2 H. of L. 29 (1870); In re Western of Canada Oil Lands & Works Company, L. R. 1 Ch. D. 115 (1875); Higgins v. Illinois Trust & Savings Bank, 193 Ill. 394, 61 N. E. 1024 (1901).

Compare In re Provident Life & Guaranty Ass'n, L. R. 5 Ch. D. 306 (1876).

[69] Statement of facts omitted, as sufficiently stated in the opinion, a part of which is omitted.

was at the time a member. If that company had been a voluntary unincorporated association of individuals, using the name of the Rossie Galena Company in its operations, the liability for its engagements would have been clear, and his defense in point of form to an action against him solely for a debt of the company, would have been the non-joinder of his associates with him in the action. How has the act of incorporation in this case shielded the stockholders from that responsibility for the debts of the company, which, acting without it, they would have incurred? It is not a general unqualified incorporation of the company imparting to the stockholders and members composing it as a legal consequence an exemption from personal liability for the debts and engagements of the body corporate. It is a legislative grant of a special qualified corporate capacity, with adequate plenary powers for the purposes of its institution, but with the personal liability of the stockholders for the debts the company shall contract, and the liabilities they shall incur. The statute, at the same time that it incorporates the company, and thereby enables them to contract debts in their corporate names, provides that the stockholders who compose the company, and for whose use and benefit purchases are made and debts contracted, in their corporate name shall, notwithstanding their incorporation, be jointly and severally personally liable for the payment of all debts or demands contracted by the company, and that any person having any demand against the corporation, may sue any stockholder, director or directors, in any court having cognizance thereof, and recover the same with costs. The Legislature thus concurrently with the creation of the body corporate, and in the same statute which creates it, enacting and providing that it shall not possess the capacity nor have the legal effect and operation which an unqualified act of incorporation would possess and have of imparting to its stockholders irresponsibility for its debts, or of contracting debts in its corporate name on the responsibility of the corporation, solely and so as to exempt its stockholders from personal liability therefor. If then the incorporation of this company does not shield or exempt its corporators and members from individual responsibility for the debts and engagements of the company, but leaves them, under the common law liability, as partners or joint debtors for those debts and engagements, must it not follow that the defendant, McCullough, he being a stockholder in the Rossie Galena Company at the time the debt of that company to these plaintiffs was contracted, became, on the consummation of the contract by the delivery of the goods to the company, liable for the payment of the debt contracted thereby? The act of incorporation affording him no protection therefrom, and not only leaving him personally liable therefor, but in express terms recognizing and affirming such liability, what defense could he make to an action charging him as a partner or joint debtor on the contract of the company? The personal liability of the stockholders to creditors under this charter, for the debts of the company, is an element of the incorporation which

wholly excludes all claim of any stockholder to treat those debts as debts of the corporate body solely, which he did not contract and is not bound to pay. The stockholders all stand under this act of incorporation on the same ground, and under the same responsibility as respects creditors, as they would if unincorporated have stood. This liability the stockholders voluntarily assumed, and it could not have been misunderstood by them. It is fully and clearly expressed in the act of incorporation. The original stockholders, by their acceptance of the charter, and subsequent purchasers in becoming members, assented and agreed to the terms and conditions of the act of incorporation. * * *

In this view of the matter it is entirely clear, that the three years statute of limitations is not applicable to the case. I am, therefore, of opinion that the judgment of the Supreme Court should be reversed, and that judgment should be rendered for the plaintiffs on the demurrer. Ordered accordingly.

BRONSON, J., concurred. JEWETT, C. J., dissented.[10]

HARRIS v. FIRST PARISH IN DORCHESTER.

(Supreme Judicial Court of Massachusetts, 1839. 23 Pick. 112.)

MORTON, J., afterward drew up the opinion of the Court.

This is an action of assumpsit, brought by one of the creditors of the Franklin Bank against one of the stockholders, to recover the amount of a post note which the bank has refused to pay. It is founded upon the 30th section of the 36th chapter of the Revised Statutes. There appear to be many creditors of the Franklin Bank equally unable to obtain their pay of the corporation, and equally entitled to a remedy against the stockholders.

The first question which arises in this case, is, whether an action in this form can be maintained.

The section under consideration provides, that "if any loss or deficiency of the capital stock in any bank shall arise from the official mismanagement of the directors, the stockholders at the time of such mismanagement shall, in their individual capacities, be liable to pay the same; provided, that no stockholder shall be liable to pay a sum, exceeding the amount of the stock actually held by such stockholder, at the time." The main object of the legislature in enacting this provision, cannot be misunderstood. It was to give the creditors security upon the individual property of the corporators, for the amount of the capital

[10] See Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571 (1900); Hawthorne v. Calef, 2 Wall. 10, 17 L. Ed. 776 (1864); McClaine v. Rankin, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500 (1905).

stock; at least so far as that depended upon the faithful administration of the affairs of the corporation. But this section is general and brief and not free from obscurity. If the capital be reduced by the misconduct of the officers, the stockholders are bound to replace it. The section does not impose upon them the obligation to pay the debts of the bank or to redeem the bills and notes, or even to keep the capital of the bank good; but only to supply the deficiencies which may have been caused by the mismanagement of the directors. If the capital be wasted and the debts greatly exceed the amount of the capital, the stockholders are only bound to restore the lost capital. And the creditors can only recover to the amount of the assets of the bank. It is not easy to see the necessity of the proviso; for in no event are the stockholders bound to pay more than the amount of their stock, which in the aggregate would form the capital of the bank. It may however be useful to guard against the implication, that the solvent stockholders would be bound to supply the deficiency of the insolvent ones.

The legislature having made this provision for the security of the bill holders and other creditors of the banks, undoubtedly intended that it should be executed, in the most full and perfect manner and according to the known usages and established rules of law. The mode of redress is not prescribed, but is left to analogy and inference. We have no precedent to guide us. This is the first action which has been brought on this statute or the previous ones of which it is a revision. The cases of Vose v. Grant, 15 Mass. 505, and Spear v. Grant, 16 Mass. 9, were actions at common law. And the case of Bond v. Appleton, 8 Mass. 472, 5 Am. Dec. 111, was founded on a statute of New Hampshire. There is however too much reason to fear, that frequent resort, in some form or other, to the important principle here established, will become necessary. Indeed there are now pending several suits in equity founded on this or the next subsequent section, which contains principles somewhat analogous.

The objection that the stockholders are not liable to any suit by the creditors of the bank, but only to the corporation itself, we think cannot be sustained. Such a remedy would be entirely unavailing. It cannot be supposed that the officers of a bank, who by their own wrong had squandered the whole or a part of the capital, would compel the stockholders, including themselves, to make up the deficiency; nor can we expect that the stockholders would remove the delinquent officers and choose others for the purpose of making themselves liable. We cannot therefore suppose that the legislature intended to establish a remedy so totally inadequate and ineffectual. And we have no doubt the creditors of the bank are entitled to an action of some kind directly against the stockholders.

The real question is, whether a suit at law or in equity, is the proper remedy. It is a well known principle, that when a statute creates a right but does not establish any particular remedy, the common law,

to effectuate the purposes of the statute, interposes and supplies a convenient and adequate remedy suited to the case. Or more properly speaking, the legislature, by necessary implication, adopt such remedy.

The plaintiff's counsel has referred us to the case of Bond v. Appleton. And doubtless that case suggested the form of declaration here adopted. But the statute upon which that action was brought, is in some respects widely different from the one under consideration. That statute makes the stockholders jointly and severally liable to the bill holders, for the whole amount of the outstanding bills. But the liability of our stockholders is limited to the amount of their stock; and no judgment can be rendered against them for a greater amount, nor for any purpose but to replace lost capital. That action failed; and it would be immaterial to inquire whether it could have been sustained or not in that form.

It is said by the plaintiff's counsel, that the provision in the 32d section, for a remedy over by a stockholder who has paid more than his proportion, against those who have paid less, implies that separate actions may be maintained. It may well be doubted, whether this remedy for contribution is not confined to cases arising under the 31st section. This would satisfy the words of the section, and seems to be the most obvious and natural construction.

If actions at law will lie, under the 30th section, suits may be multiplied to an indefinite extent. Each bill holder or other creditor must have his separate suit, and each stockholder must be sued separately. Again, suits between stockholders to adjust their contributions, would be interminable. If a creditor's demand be larger than the amount of stock owned by any one, he must have several suits against several individuals on the same cause of action, or lose a part of his just demand. If any one stockholder, owned more stock than was needed to meet any one claim made upon him, he would be liable to several suits.

It may happen, and probably has happened in this instance, that a bank owes more than the amount of its whole capital. In such case there must either be a pro rata division among the creditors, of what may be recovered, which would be impracticable in suits at law, or those who sue first must recover the whole of their debts, leaving others totally remediless, which would be palpably unjust.

The evils and inconveniences of attempting to enforce this section by suits at common law, would be incalculable; and such remedy would be inadequate, vexatious and mischievous. The only proper means of giving effect to this provision is by a process in equity; and this, of all cases which can arise, seems to call most loudly for a chancery jurisdiction. To a bill in equity all persons, however numerous, might be made parties; and all the relative and conflicting claims of the many creditors and stockholders settled and their proportionate rights to recover and liabilities to contribute, adjusted in a single suit.

We are all therefore of opinion, that this case comes within the equity jurisdiction of the Court; and that an action at law will not lie. Plaintiff nonsuit.[71]

LAURAGLENN MILLS v. RUFF; SAME v. FREIDHEIM & BRO.; SAME v. RODDY.

(Supreme Court of South Carolina, 1899. 57 S. C. 53, 35 S. E. 387, 49 L. R. A. 448.)

McIVER, C. J.[72] The appeals in the three cases above stated, involving the same question, were heard and will be considered together. The actions were brought by the plaintiff, as a creditor of the Globe Cotton Mills, an insolvent corporation, to recover from the defendants, severally, 5 per cent. of the amount of the stock held by the defendants, respectively, in said insolvent corporation. The statute reads as follows: "That each stockholder in any such corporation shall be jointly and severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding five per cent. of the par value of the share or shares held by such stockholder at the time the demand of the creditor was created," etc.; the balance of the section not being pertinent to the present inquiry. Section 1500, Rev. St. 1893. Each of the defendants answered, setting up, amongst other things, the defense, by way of set-off, that the Globe Cotton Mills was indebted to each of them in an amount exceeding the amount of plaintiff's demand. To such defenses the plaintiff demurred in each of the three cases, upon the ground that the indebtedness of the Globe Cotton Mills to the defendants, respectively, cannot be pleaded as a defense, by way of set-off, to the demand of the plaintiff. These demurrers were overruled by the circuit judge in a short order, giving no reasons; and the plaintiff appeals in each of the cases upon the grounds set out in the record, which need not be set out here, as the sole question presented for the decision of this court is whether a stockholder in a corporation, who is also a creditor of such corporation, can set up, by way of defense, his claim against the corporation, to an action at law brought by a creditor of such corporation, who is not a stockholder, to recover from him the amount of his statutory liability.

So far as we are informed, we have no case in this state which decides this particular question, and the authorities elsewhere are not in harmony. We must therefore rest our decision upon reason, aided by such authorities elsewhere as seem to us to be the better founded

[71] Accord: Coleman v. White, 14 Wis. 762, 80 Am. Dec. 797 (1861); Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376 (1874).
Contra: Bank of Poughkeepsie v. Ibbotson, 24 Wend. (N. Y.) 473 (1840).

[72] A part of the opinion is omitted.

in reason. It is conceded that if this were an action on the equity side of the court, in the nature of a creditors' bill, the right of set-off here claimed could not be allowed, under the authority of Parker v. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888, and Efird v. Investment Co., 55 S. C. 78, 32 S. E. 758, 897, besides other cases that might be cited. But it is contended that the rule does not apply to a case like this, where a single creditor of an insolvent corporation brings an action at law against a single stockholder of such corporation to recover the amount of his liability fixed by the statute. We are unable to perceive any sufficient reason for the distinction claimed. At common law the stockholders of a corporation could not be liable individually for the debts of such corporation. But the growth of these artificial bodies has become so great, and their powers so extensive, that the legislature has deemed it necessary, when asked to confer upon an association of persons corporate powers, to accompany the grant of such powers with such qualifications and conditions as are supposed to be necessary for the protection of individual citizens,—especially creditors of corporations. One of these conditions is that the persons composing such a corporation (the stockholders) shall become liable individually for the debts of the corporation, to the extent prescribed by the charter of such corporation.

Now, what are the rights conferred upon a creditor of the Globe Mills by the charter of that corporation? This question can best be answered in the language of this court in the case of Hall v. Klinck, 25 S. C., at page 356, 60 Am. Rep. 505, when the court was considering the scope and effect of another charter, practically the same as that of the Globe Mills, so far as it related to the provision making stockholders liable for the debts of the corporation to the extent prescribed. There the court said: "It seems to us that the intention of the legislature, as derived from the language used in the charter now under review, was to protect the interests of creditors, and not stockholders, of the corporation, by affording the former a cheap and expeditious mode of enforcing the payment of their debts; thus insuring, as far as practicable, the utmost good faith and the most prudent management on the part of those interested in corporations, which, by virtue of associated capital, energy, and brains, necessarily acquire large advantages over the individual citizen. If the liability secured by this act could only be enforced by a proceeding in equity, oftentimes tedious and expensive, it would amount to a practical denial of the security intended to be afforded, in many cases; for creditors holding small demands would be deterred, by the expense and delay which they would have to encounter, from availing themselves of the remedy provided." Hence it was held in that case that there was no error on the part of the circuit judge in holding that the plaintiff could maintain an action at law against a single stockholder to recover the amount due him to the extent of the liability imposed upon him by the charter.

If, therefore, such an action can be maintained, then it must, in the absence of any provisions to the contrary in the charter (and there is nothing of the kind here), be governed by the same rule as would apply to any other action at law on an ordinary money demand.

One of these well-settled rules is that in such an action, to entitle the defendant to plead a set-off as a defense, the claims must be mutual; and here the essential element of mutuality is entirely wanting, for it is not pretended that the plaintiff owes defendant anything, but the defendant is seeking to escape a liability imposed upon him by statute, by showing that this insolvent corporation, from which plaintiff has been unable to obtain payment of his claim, owes him a debt. In other words, the proposition relied upon by defendants in support of their claim amounts practically to this: That a stockholder of an insolvent corporation, when sued by a creditor of such corporation for the liability imposed upon each stockholder by the terms of the charter of the corporation, may avoid such liability by showing that the corporation is indebted to him in an amount exceeding the plaintiff's claim. Such a proposition does not commend itself to our approval, especially when, in many cases, such a proposition, if approved, would defeat the very object of the statutory provision, which, as we have seen, was intended "to protect the interests of creditors, and not stockholders." If it should be said, as has been said in some of the cases, that to refuse to allow a stockholder, when sued by a single creditor, to plead as a defense, by way of set-off, that the corporation is indebted to him, that it would sometimes operate inequitably as between the defendant in such a case and the other stockholders, the answer may be found in the case just cited, where the court, in referring to this point, used the following language: "If the remedy given operates harshly or inequitably as between the stockholders themselves, it is for them, and not the creditors, to invoke the aid of that tribunal which has the power to adjust the equities amongst themselves;" citing Ogilvie v. Insurance Co., 22 How. 380, 16 L. Ed. 349. See, also, a similar view thrown out by Denis, J., in Garrison v. Howe, 17 N. Y. 458,—one of the cases cited by appellant in its argument here.

On the other hand, it may be said that to allow a defense by way of set-off in a case like the present would in some cases result in giving the stockholder, who is likewise a creditor of an insolvent corporation, a preference over all the other creditors; for it would not be difficult to conceive of a case in which a stockholder, who is also a creditor of an insolvent corporation, might be able to obtain satisfaction in full of his claim against such corporation, if he is allowed to set off such claim as a defense to an action brought by an outside creditor to recover from such stockholder the amount of his statutory liability, while all the other creditors would be able only to obtain a small percentage of their claims. * * *

The judgment of this court is that the orders appealed from be reversed, and that the cases be remanded to the circuit court for such further proceedings as may be necessary.[78]

JACKSON v. MEEK.

(Supreme Court of Tennessee, 1888. 87 Tenn. 69, 9 S. W. 225, 10 Am. St. Rep. 620.)

FARRER, Special Judge. The facts of this contention necessary to be stated are as follows:

The Chronicle Company was regularly incorporated a body politic and corporate in January, 1883, under the act of the legislature entitled "An act to provide for the organization of corporations," approved March 23, 1875, and section 21 of said act. The defendant, Meek, was one of its charter members, and continued a stockholder therein down to November, 1885, when he disposed of his stock. Plaintiff, Jackson, also owned some stock in the Chronicle Company, but disposed of it before defendant, Meek, parted with his stock. Jackson was in the service of the company from February, 1885, to the following June, at a salary of $12 per week. In December, 1885, Jackson had settlement of his wage-account with the company, when it was found that there was due him thereon $199.17; he receipted the pay-roll of the company, but received no money, and took the company's note for the amount due him for wages. While in the company's service Jackson loaned it $350, and took its note therefor. In May, 1886, Jackson took a justice of the peace's judgment for the aggregate of his two notes against the company, and afterwards, in same month, on his own petition, Jackson was made a party to a proceeding in the chancery court to wind up the Chronicle Company as an insolvent corporation, and received his pro rata upon said judgment, which was about 20 per cent.

April 11, 1888, Jackson took a justice of the peace's judgment against defendant, Meek, for $112.17, it being the balance of his claim for wages after being credited with its pro rata, and $50 paid by a shareholder of said company. Meek appealed from this judgment to the circuit court, where there was a trial before the judge without the intervention of a jury, and judgment in his favor, the trial court holding that Jackson was estopped by taking the company's note for his wages, and his subsequent efforts to collect from the corporate assets.

Is there reversible error in the ruling of the trial court? The general rule of the common law holds the shareholder of a corporation liable for the debts of the association only so far as he may have

[78] Compare Pierce v. Security Co., 60 Kan. 164, 55 Pac. 853 (1899); Boice v. Hodge, 51 Ohio St. 236, 37 N. E. 265, 46 Am. St. Rep. 569 (1894); Ball Electric Light Co. v. Child, 68 Conn. 522, 37 Atl. 391 (1897).

agreed to contribute to the capital stock of the company. His liability is in his corporate capacity, and is deemed the primary source for the payment of the company' debts. But our legislature has superadded to this common-law liability in corporate capacity an individual liability upon the stockholders of all corporations incorporated under section 21 of the act of 1875, in favor of journeymen's, servants', and employés' wages that may be earned in the company's service. This liability is regarded as a secondary source for the payment of debts provided for. Each wage-earner of the Chronicle Company had two sources for the payment of his debt—First, the corporate assets; and, second, the individual stockholders. The current of adjudged cases in other states seems to hold that each stockholder, upon becoming such in a company with this individual liability provision, does so with the understanding that he will not be held to pay individually until the corporate assets have been found to be insufficient. We assent to the soundness of this proposition. 2 Mor. Priv. Corp. § 869 et seq.; Thomp. Liab. Stockh. § 334.

It follows therefrom that the plaintiff, Jackson, in seeking to collect his debt for wages in the first instance from the assets of the Chronicle Company, was in the line of duty, and certainly not thereby estopping himself from afterwards availing himself of the benefit secured him by the individual liability clause of the charter, and that the trial judge is in error, and his judgment should be reversed.

But it is insisted that the defendant, Meek, having parted with his stock in November, 1885, some two years before the suit against him before the justice was commenced, his individual liability for the plaintiff's debt for wages ceased to rest on him, and passed over to his transferee, to whom the plaintiff must now look. Is this correct? When the wage-earners who were in the employ of the Chronicle Company, and contracted with it, contracted upon the faith of this individual liability clause, the offer of the shareholder contained in the clause in question being accepted by the "servants and employés" of the company, ripens into a binding contract. This binding contract was upon these shareholders who were such at the time the service was rendered.

This individual liability, when ripened into a binding contract, is beyond the control of the company or its officers. None but those for whose benefit the provision was made can release the contract. To hold differently would practically destroy this provision for the wage-earner's benefit. When the shareholder sees the approaching insolvency of the corporation, he has only to make a transfer of his stock to a straw man, fold his arms, and let the crash come. We hold that the legislature did not intend to place the life of this security in the hands of the shareholder, but designed it to be a security, the burden of which cannot be shifted by the shareholder to another, to the prejudice of the wage-earner, without his concurrence.

If material, it is not shown to whom the defendant Meek's stock

was transferred,—whether to one able to discharge the liability for wages nor whether transferred in good faith.

Under the facts of this case the defendant Meek has not relieved himself of liability, under the clause, to the plaintiff.

The judgment of the court below is reversed, and the plaintiff will have judgment here against the defendant, Meek, for the amount of the justice of the peace's judgment, with interest, and for all of the costs of the cause.[74]

BARTLETT v. DREW.

(Commission of Appeals of New York, 1874. 57 N. Y. 587.)

This was an action in the nature of a creditor's bill brought by plaintiff as judgment creditor of the New Jersey Steam Navigation Company after the return of an execution, nulla bona, to reach certain assets of the said company alleged to be in the hands of defendant, Drew.

In September, 1866, the plaintiff recovered in the Supreme Court a judgment against the New Jersey Steam Navigation Company, a corporation created by the laws of the State of New Jersey, for $836.32 upon a cause of action accruing in the month of July, 1863. An execution upon the judgment was duly issued to the sheriff of the city and county of New York and returned unsatisfied. The corporation was created in February, 1839, with a capital of $500,000, and had an existence of thirty years' duration which terminated in the month of February, 1869. In 1868 this action was commenced against the corporation and Daniel Drew, who was a large stockholder therein as well as a director and president of the board and a resident of the city of New York. The business of the corporation was that of a common carrier, transporting passengers and freight for hire by steamboats between New York and various eastern ports. It appeared that in December, 1863, by order of the board of directors, three steamboats of the company were sold for $750,000, and in December, 1865, the proceeds of the sales were divided among the stockholders of the company, and the defendant, Drew, received for his share an amount much larger than the plaintiff's judgment against the company.

REYNOLDS, C. It is insisted by the defendant, Drew, that the plaintiff can maintain no action against him alone, but that she must prosecute not only all the stockholders, to the end that each shall contrib-

[74] See Brown v. Hitchcock, 36 Ohio St. 667 (1881); Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183 (1853).

Contra: Bowden v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 396 (1882); Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639 (1897); Earle v. Carson, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373 (1902); McDonald v. Dewey, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. Ed. 1128, 6 Ann. Cas. 419 (1906).

ute his proportion to the payment of her debt, but her suit must be brought on her own behalf and on behalf of all the other creditors of the corporation who may choose to come in. In other words, in order to collect her debt against the company, she must institute a suit to wind up and finally settle all its affairs. That she might do this is not to be doubted, but that she of necessity must do it presents a different question. Prior to the distribution of the assets of the corporation due notice of the plaintiff's claim was given, and redress demanded, and the distribution was made with knowledge of the plaintiff's claim, and the corporation has no assets or property which can be taken on execution.

We are of the opinion that the plaintiff's right of action rests upon a very plain principle of equity. This is not a proceeding to dissolve and wind up the affairs of a corporation, or to marshal its assets, but the ordinary proceeding to collect a debt from a debtor unwilling to pay. The circumstance that the debtor is a foreign corporation, or that the defendant, Drew, was its president, director or stockholder, is quite immaterial, if it be found that Drew has any of the assets or property of the corporation which ought to be applied in payment of its debts. It is equally immaterial whether he got it by fair agreement with his associates, or by any wrongful act. If the law dooms it to the payment of the debts of the corporation it may be taken in some form by the creditor. It is a very plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. 2 Story Eq. Jur. § 1252. Where stock and property has been divided between stockholders before all the debts of the corporation have been discharged, if any one stockholder is compelled to pay more than his fair share of any unpaid debt he may resort to his associates for equitable contribution; but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that may exist between his debtors. In the present case the corporation was proceeded against as an ordinary debtor, either unwilling or unable to pay. It turned out that it had no property which could be taken on execution; but it was found that the defendant, Drew, had a large amount of the assets in his possession, which belonged to the corporation when the plaintiff's demand accrued, and some portion of which should have been applied in discharge of its obligation to the plaintiff.

As before suggested, it does not matter how it came to the possession of the defendant, Drew. It is enough that he had it, and it was so much of the assets of the corporation as ought to be devoted to the payment of the debts of the company, and his claim as a stockholder could not prevail over the creditor's prior right. Curran v. State of Arkansas, 15 How. 305, 14 L. Ed. 705; Tinkham v. Borst, 31 Barb. 407, 412; 2 Kent Com. 307; 2 Story Eq. Jur., § 1252. This view of the case renders the consideration of several questions ar-

gued by the learned counsel for the defendant, Drew, in respect to parties and the form of proceeding, quite unnecessary. We are referred however to two cases in Massachusetts, of which a word may be said. Vose v. Grant, 15 Mass. 505; Spear v. Grant, 16 Mass. 9. They were both actions on the case at common law, by the billholder and creditor of a bank, whose charter had expired and assets distributed, against a stockholder who had received a portion thereof. The action proceeded entirely upon the theory that the distribution was wrongful before all the debts of the corporation were paid; and that for this alleged wrong an action on the case at common law might be maintained by a creditor against each stockholder who had profited by the wrongful division. After a very elaborate consideration by the court the right of action was denied, and whether properly or improperly does not affect the present case. The Supreme Judicial Court of Massachusetts had at that time no equity jurisdiction, and this circumstance was lamented by Jackson, J., in delivering the opinion of the court in the case first cited. Whether the apparent hardship of that case, or possibly of many others, had any influence, it is certain that soon after the law-making power of the State conferred upon the court equity jurisdiction.

With the nice distinction between law and equity we are not troubled in this case, nor even as to the form of the action. The plaintiff is a creditor of the New Jersey Steam Navigation Company for the amount of a judgment duly obtained. The company has no property in this State that can be taken on execution. The defendant, Drew, is found to be in possession of assets of the dissolved or insolvent corporation more than sufficient to pay the plaintiff her demand, and the law requires that he should pay it.

The judgment below should be affirmed, with costs. All concur. Judgment affirmed.[75]

SECTION 6.—CREDITORS' RIGHTS AGAINST THE OFFICERS OF THE CORPORATION

WINTER v. BAKER.

(Supreme Court of New York, 1867. 34 How. Prac. 183.)

Action for damages. The complainant alleged that he was the holder and owner, for value, of a large amount of bank bills issued by a banking corporation of the state of Georgia; that the defendant was a director in said bank ever since January 1, 1857; that prior

[75] See accord: Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944 (1824); Railroad v. Howard, 7 Wall. 392, 19 L. Ed. 117 (1868); Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577 (1893).

to January 1, 1861, the bank was solvent and able to pay all its debts; that after July 1, 1861, the bank became, and has ever since been, insolvent and unable to pay its debts; that this insolvency was caused by various acts of malfeasance and misfeasance of the defendant and the other directors, among said acts being the following:

1. Selling the valuable assets of the bank for bills, notes and bonds of the Confederate States.

2. Receiving deposits of Confederate money, and repaying them with good and valid assets of the bank.

3. Making unlawful agreements on behalf of the bank with third parties, and settling them with the valuable assets of the bank.

4. Selling the assets at credit in banks of New York, London and elsewhere, for Confederate money and bonds.

5. Exchanging the bills of the bank for Confederate money.

6. Disposing of the gold and other assets, without getting value therefor.

7. Using the funds of the bank in speculation, for defendant's own gain and profit.

8. Selling cotton and other assets of the bank to the defendant himself, and other directors, without securing value therefor.

9. Paying dividends to stockholders, including defendant, after the bank had suspended.

10. Loaning to the defendant himself, assets of the bank, which were repaid and settled in depreciated currency.

The defendant demurred to the complaint, upon the grounds that the complaint did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction of the subject of the action, and for defect of parties.

CLERKE, J. These are actions brought by the several plaintiffs as the holders of the bills of a bank incorporated by the state of Georgia, against the defendant as a director of the corporation.

The reasons which I have mentioned in the preceding cases apply to these with greater force. But more especially applicable to these cases is the rule well established, that a stockholder cannot sue directors for damages, on the ground their stock was made valueless by the misconduct of the defendant. If a stockholder cannot maintain such an action, a creditor certainly cannot do so.

Judgment on the demurrers, with costs.

O'CONNER MINING & MFG. CO. v. COOSA FURNACE CO.

(Supreme Court of Alabama, 1891. 95 Ala. 614, 10 South. 290, 36 Am. St. Rep. 251.)

WALKER, J.[76] The bill was filed by the O'Conner Mining & Manufacturing Company as a simple contract creditor of the Coosa Furnace Company, and its principal purpose was to reach and subject to the payment of the debt claimed certain property alleged to have been fraudulently conveyed by the Coosa Furnace Company,—first, by a mortgage executed on the 7th day of April, 1884; and, again, as to a part of the property, by a deed of absolute conveyance executed on the 13th day of July, 1885.

The specified ground of attack upon the conveyances in question is that they were executed for the purpose and with the intent to hinder, delay, or defraud the complainant, and to prevent it from enforcing collection of its just demands; and that the debts the mortgage was given to secure, and also the considerations recited in the deed, were simulated, and not real. The execution of the two instruments is alleged in the bill, and is admitted in the answer. The instruments must stand, unless the particular infirmities charged against them are shown by the evidence. There are no allegations to support a contention that their formal execution by the corporation was insufficient in any particular. The charge that the considerations recited in the two instruments, respectively, were simulated, and not real, is not sustained by the proof. * * *

Much stress is laid in the bill and in the argument of counsel for the appellant upon the relations existing between the several defendants during the time covered by the transactions which are sought to be impeached. The dealings in question were between the Coosa Furnace Company, on the one side, and the Wabash Iron Company, the Vigo Iron Company, A. L. Crawford, and his two sons, J. P. Crawford and A. J. Crawford, on the other side. It is true that each of the corporations mentioned was controlled and dominated by the Crawfords. The great bulk of the stock in each of them was owned and held by members of the Crawford family. The board of directors in each of the corporations was composed of the Crawfords and their adherents. It thus plainly appears that the transactions were between the Coosa Furnace Company and some of its own stockholders and directors, and also two other corporations, having boards of directors composed of the same persons who managed and controlled the first-named company. * * *

The directors of a corporation, in the transaction of its business and the disposition of its property, do not stand in any such relation to the general creditors of the corporation as they occupy to the cor-

[76] Facts sufficiently stated in the opinion, a part of which is omitted.

poration itself and to its stockholders. They are not the agents of such creditors, nor can they usually be regarded as trustees acting in their behalf. The creditors are not entitled to disaffirm a transfer of the property of the corporation, made by its directors or other agents, merely because the corporation itself or its stockholders could have done so. When a disposition of the property of a corporation is assailed by its creditors they are not clothed with the right of the corporation or of its stockholders to set aside the transaction, regardless of its fairness or unfairness, on the ground that it was entered into by representatives of the corporation who had put themselves in a relation antagonistic to the interests of their principal. The right of the creditor to impeach the transaction depends upon its fraudulent character. The question in such case is, was the transaction which is complained of entered into with the intent to hinder, delay, or defraud creditors,—was the property fraudulently transferred or conveyed? The mere fact that the corporation, in disposing of its property, dealt with persons who at the same time were charged with the duty of representing its interests does not by itself render the transaction fraudulent. Corrugating Co. v. Thacher, 87 Ala. 458, 6 South. 366.

Where the property of a corporation is transferred to another corporation represented by the same directors, the fact of such relationship is a circumstance well calculated to arouse suspicion, and calls for a rigid and severe scrutiny in the examination of such transaction when it is assailed by a creditor. When such a relationship is shown to exist between the contracting parties, clearer and fuller proof must be given of a valuable and adequate consideration, and of the good faith of the parties, than would be required if the transferee or grantee had been a stranger. When, however, such examination is made and such proof is forthcoming, and the result is that no fraud or unfair dealing is shown, and it appears that the transaction was not vitiated by any infirmity of which a creditor has the right to complain, then the transaction must stand, and it is as valid, as against the creditor, as if the corporation had dealt with a stranger, who was not involved in any way with the corporate representatives. * * *

It is alleged in the amendment to the bill that the Coosa Furnace Company was insolvent at the date of the execution of the mortgage, and has been insolvent ever since that time. Even if it could be conceded that the fact of insolvency, if proved, would create such a change in the relations between the directors and the creditors of the corporation as to take from the directors the right to allow one or more creditors to acquire an advantage over the other in the application of the corporate assets to the payment of debts, yet such concession could have no effect upon the result in this case, because the evidence wholly fails to show that the company was insolvent when the mortgage was made. It plainly appears that the company was insolvent 15 months after the date of the mortgage. Its property was

then worth very much less than it cost. What it was worth at the time the mortgage was executed is not shown. It appears from the evidence that the value of furnace property is very fluctuating. The value of the company's assets at the date of the mortgage is not proved, nor is it shown that they were then worth less than the amount of the company's liabilities at that time. The inference that the company was insolvent at the date of the mortgage does not follow from the proof of insolvency more than a year afterwards. The insolvency of the company at the date of the deed does not affect the validity of that instrument, for the operation of the deed was merely to transfer, in absolute payment of a debt, property which had been conveyed as security therefor at a date when the corporation is not shown to have been insolvent. * * *

As, in our opinion, the proof fails to sustain the charge that the transactions which are assailed were fraudulent, the conclusion is that the complainant is not entitled to relief. The decree to that effect must be affirmed.

Affirmed.[77]

WILLIAMS, Receiver, v. McKAY et al.

(Court of Errors and Appeals of New Jersey, 1885. 40 N. J. Eq. 189, 53 Am. Rep. 775.)

BEASLEY, C. J.[78] This bill was exhibited by the receiver of the Mechanics' & Laborers' Savings Bank against its managers, for the purpose of holding them liable for certain losses sustained by the institution from time to time through a series of years. The right to the relief prayed is based on the alleged negligence of these officers in the management of the corporate affairs.

The bill, which is somewhat loosely framed, contains, in substance, a statement, which is mainly substantiated by details, of official delinquencies in the following particulars, viz.: First, in the investment of moneys in a large number of specified instances on insufficient landed security, and in violation of the charter of the company; second, in the loaning of other moneys on mere personal security; third, in permitting the president of the bank, one John Halliard, to withdraw, without giving adequate security, and to apply to his own use, the funds of the bank; and fourth, in the failure to require the president to give bond for the faithful performance of his official duties.

The question before this court is whether the decree appealed from

[77] Nappanee Canning Co. v. Reid, Murdock & Co. (semble) 159 Ind. 614, 64 N. E. 870, 1115, 59 L. R. A. 199 (1902); Marsters v. Umpqua Valley Oil Co., 49 Or. 374, 90 Pac. 151, 12 L. R. A. (N. S.) 825 (1907).

[78] Facts stated in the opinion, a part of which is omitted.

is to be sustained which holds that these charges, as stated in the bill, do not lay any ground of equity in the complainant.

Viewed in its general aspect, the equitable rule which is applicable to persons holding official positions such as were held by these defendants, is not in doubt. The duty belonging to such a situation is a plain one—to care for the moneys intrusted to them in the manner provided in the charter, and to exercise ordinary care and prudence in so doing. It is true that the defendants were unpaid servants, but the duty of bringing to their office ordinary skill and vigilance was none the less on that account, for to this extent there is no distinction known to the law between a volunteer and a salaried agent. These defendants held themselves out to the public as the managers of this bank, and by so doing they severally engaged to carry it on in the same way that men of common prudence and skill conduct a similar business for themselves. This is the measure of the responsibility of officers of this kind.

Nor do I find anything in the charter now before us that curtails or limits the responsibility thus defined. There appears to be neither provision nor expression in this law that indicates a legislative intention to absolve any of these managers from the duties and responsibilities generally inherent in the office filled by them. The charter required the defendants to meet at least twice a year as a board of managers, and such regulation was almost entirely useless unless on such occasions it was their duty to supervise the conduct of their committees, and to look generally into the affairs of the company. There is no ground for the belief that it was the intention of the legislature that none but such managers as acted on committees, should have the charge of the affairs of this bank. The only guaranty given to depositors consisted in the reputation of its managers with respect to probity and fiscal ability, and such guaranty was a mere snare if more than two-thirds of such officers were to have no substantial part in the management.

Doubtless such officers had the right to rely in many respects on the skill and diligence of their committeemen, and if, exercising a reasonable circumspection, they were unaware of the misconduct or neglects of such agents, they would not be responsible for the consequences. But so plain was their duty to oversee the business done by such committeemen that, it seems to me, they are chargeable, prima facie, with a knowledge of what was doing or had been done in all important matters by such bodies. That they themselves thought this duty of general supervision was incumbent upon them, is perfectly manifest from the entire tenor of the by-laws prescribing the conduct of business at the semi-annual meetings, and providing that at such times should be read the reports of the treasurer and committees, and of the minutes of the finance committee. From these considerations I think it must be conceded that these officers had no special dispensation from

the exercise of that degree of care and vigilance that the law generally exacts of persons holding similar positions.

Nor can I yield to the plea that is so much pressed in the briefs of counsel, that most of the neglects and misfeasances charged in this bill are of such long standing that they are shielded from inquiry by the statute of limitations. After careful examination, my clear conviction is that the statute in question has no place in this proceeding.

It is a mistake, sure to mislead, to regard this suit as one solely in right of the insolvent corporation. It does not rest upon that narrow footing, for the receiver represents not only the corporate body, but likewise the depositors and creditors; and the question which presents itself, therefore, is as to the status of the managers with reference to the latter two classes of persons; and as to them, I entertain no doubt whatever that these officers must respond to them in the character of their trustees.

In reaching this conclusion, the principle so often stated in the decisions and text-books is in nowise controverted, that a trust, to be exempt from the operation of the statute of limitations, must be of a nature to stand the triple test, viz.: first, it must be a direct trust; second, it must be of a kind belonging exclusively to the jurisdiction of a court of equity; and, third, the question must arise between the trustee and the cestui que trust. And in each of these respects, the present case harmonizes with the standard. If it is a trust at all, it certainly is a direct one, for it arises immediately upon the placing of the funds under the control of this body of officers. Such a transaction has nothing of the nature or qualities of those indirect trusts that require, for their creation, a decree of a court of chancery, as, for example, where money, under certain circumstances, has been fraudulently secreted, and a decree in equity will ofttimes convert it into a trust.

It is admitted, on all sides, that depositors in one of these banks acquire, ipso facto, an equitable right, which, by taking a certain course, they can put in force against the directors or managers, if they have sustained a loss by reason of the misfeasance of such officers; and if such a right exist, what is it, if not the right of a cestui que trust against his trustee? This right, thus referred to, is, very plainly, not a right inherent in a contract, for a depositor pays his money to the corporation, and makes no bargain with the managers. And yet the law indisputably establishes an equitable right in his favor from the naked fact of his relationship with this class of officers. And it would be singular, indeed, if the law did not raise up a trust out of such a connection.

The affair between the depositor and the managers embraces all the materials out of which trusts are created, for I know of no reason why the transactions denominated trusts have been invested by law with their peculiar qualities and characteristics, except that the prop-

erty that they embrace is put, by way of confidence, under the absolute control of the person called the trustee, and that the person in whose favor it is so placed cannot enforce or protect his interest in a court of law. And this in all respects is the situation when a man places his money in one of these banks; the transfer of such money is nominally to the corporation, but with the intent to put it under the unsupervised control of the managers, in whose appointment the depositor takes no part, his sole reliance being in the honesty and general trustworthiness of such officers, and such an affair, as it admittedly creates an equitable right on the one side, and a correlative obligation on the other, necessarily establishes a direct trust.

It will be also observed that the transaction exhibits the second and third requisites of a trust, inasmuch as the right of the depositor to look to the managers for reparation when a loss has been occasioned by their default, is an equitable one, cognizable only in a court of conscience, and the present proceeding is between the trustee and the legal representative of the cestuis que trustent. And upon this subject the court of appeals of New York, in the case of Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546, decides that the relation between a savings bank and its directors is that of principal and agent, and the relation between its directors and depositors is similar to that of trustee and cestui que trust.

Nor is a contrary view upon this subject expressed by the supreme court of Pennsylvania in Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684, and which is a decision much relied on by the counsel of some of the defendants. The only pertinent point decided in that case is that the statute of limitations began to run in favor of a director as soon as he vacated his office, but in so deciding the court was careful to say that the case before it was one between the stockholders and directors, and not one between the latter class of officers and creditors or depositors. With respect to the effect of the statute upon the doings of the officers so long as they continued in office, the court expressly refused to express an opinion upon the question. It is obvious, therefore, that his case has but small pertinency to the present inquiry.

And looking upon the present controversy as growing out of a trusteeship, it seems to me incompatible with such a conclusion to hold that the statute in question will begin to run upon the vacation of his office by the manager, because such an act has not changed the essential nature of the transaction, for the right of the depositor remains, as before, a purely equitable one, which he cannot enforce in a court of common law. And it is the accrual of the right of action at law which calls the statute, by force of its own terms, into play. Lapse of time, therefore, is not an absolute bar to an equity of this nature, but lapse of time is often a strong, and sometimes a conclusive, circumstance in the administration of the law of equity.[79]

[79] See In re National Funds Assurance Co., L. R. 10 Ch. Div. 118 (1878).

[The Court concluded that the bill showed delinquency in official duty by the defendant officers.]

The decision below should be reversed, and a decree made in favor of the receiver on all the demurrers. Decree unanimously reversed.

MITCHELL et al. v. HOTCHKISS.

(Supreme Court of Connecticut, 1880. 48 Conn. 9, 40 Am. Rep. 146.

LOOMIS, J.[80] This action was originally brought by the plaintiffs, as creditors of the Star Tool Company, a joint stock corporation located at Middletown in this state, against Julius Hotchkiss, then in life, but since deceased, to recover the amount of their debt contracted during the period that Hotchkiss as president of the corporation intentionally neglected to comply with the statutory requirements as to filing with the town clerk of Middletown certain certificates showing the condition of the affairs of the corporation. For the purposes of this case it is conceded that Hotchkiss had by his neglect become liable under the statute referred to. But pending the suit and before trial he died leaving a will. The plaintiffs thereupon caused to be issued a scire facias, summoning his executors into court to show cause why they should not be made parties defendant to the suit. The executors appeared and filed a plea in abatement on the ground that the action, originally begun against Hotchkiss, did not upon his death survive against them. To this plea the plaintiffs demurred, but the court overruled the demurrer and dismissed the scire facias, and the question comes before this court for review by the plaintiffs' motion in error.

There is no statute controlling the question under consideration. The only provision is that found in the General Statutes, p. 421, § 6, that "if the defendant in any action shall die before final judgment, it shall not abate if it might originally have been prosecuted against his executor or administrator." To determine the question whether an action might originally have been brought to charge the estate of Hotchkiss with the statutory liability referred to incurred by him in his life time, we must invoke the aid of the common law.

The principles of the common law on this subject are embodied in the maxim—"Actio personalis moritur cum persona."

The executor represents the person of the testator, and in legal consequence may be said to continue his existence with respect to all his debts, covenants and contract obligations, which became due during his life or after his death, except such as depend on his personal skill, in which is always implied the condition that the contractor is not prevented from completing his contract by the act of God.

But all private as well as public wrongs and crimes are buried with

[80] Facts sufficiently stated in the opinion, a part of which is omitted.

the offender. The executor does not represent or stand in the place of the testator as to these, or as to any acts of malfeasance or misfeasance to the person or property of another, unless some valuable fruits of such acts have been carried into the estate; and this in strictness constitutes no exception to the rule, for the executor in such case cannot be made liable for the tort of his testator, but only for the implied promise which the law raises and allows the injured party to put in the place of the wrong.

In the light of these principles we are called upon to determine the nature of the liability imposed by the statute in question.

By section 17, p. 280, of the General Statutes, it is made the duty of the president and secretary of joint stock corporations annually, on or before the 15th day of February or of August, to make and lodge with the town clerk where the corporation is located, a certificate signed and sworn to by them, showing the condition of its affairs as nearly as the same can be ascertained on the first day of January or of July next preceding the time of making such certificate, stating the amount of paid capital, the cash value of its real and personal estate and credits, and the name, residence and number of shares of each stockholder.

Section 18, which creates the liability on which this action is founded, is in these words: "Any president or secretary of such a corporation who shall intentionally neglect or refuse to comply with the provisions of the preceding section, shall be liable for all the debts of said corporation contracted during the period of such neglect."

We do not see how it is possible to construe this statute as creating or attempting to create any contract relation or duty between the creditors of a corporation and its president. The adoption of such a construction would suggest grave doubts as to the validity of the act which should attempt so arbitrarily to make a debtor out of a stranger to the debt, or in other words, to make the debt of one person the debt of another. There was no privity between Hotchkiss and the plaintiffs; they had no transaction with each other, and the former owed the latter no private duty from which a promise might be implied.

The argument for the plaintiffs seems to be based principally upon the assumption that the officers of a corporation are under some original common law liability to pay all the debts contracted by it while they as officers are in default as to the performance of any of the duties prescribed by statute; that their exemption from personal liability under the corporate organization is not an absolute but only a conditional one.

This reasoning in fallacious. There may be cases where the organization is so defective that creditors need not recognize it as a corporate being at all, in which case the so-called officers or active agents in its business transactions may perhaps under some circumstances make themselves personally liable. But conceding the lawful organization and existence of the corporation, the existence of all its members, of-

ficers as well as stockholders, so far as its transactions are concerned, become merged in the artificial being, so that in contemplation of law they are utter strangers to those who deal with the corporation; and as stockholders and officers they are never liable except so far as the law makes them liable.

The theory of the plaintiffs' declaration also tends to confute the argument. The action does not profess to be predicated on any promise, original or collateral, express or implied, but is an action on the case founded on the statute. There is nothing in the record to suggest a possibility that the estate of the testator could in any way have been increased or benefited by the misfeasance or non-feasance complained of.

It seems clear that the duty to be performed was a public duty, required by public policy for the general welfare. In the language of Mr. Justice Clifford, in giving the opinion relative to the identical statute we are considering, in the case of Providence Steam Engine Co. v. Hubbard, 101 U. S. 188, 25 L. Ed. 786, the act was passed "by the state to enable the business public to ascertain the pecuniary standing of joint stock corporations."

The wilful neglect of the prescribed duty was a public wrong invoking the penalty of the statute; and the statute comes clearly within the definition of a penal one, as given in 2 Bouvier's Law Dictionary, where it is defined as "a statute that inflicts a penalty for the violation of some of its provisions."

The Supreme Court of the United States in the case just referred to, after full discussion, unhesitatingly pronounced this statute a penal one, to be strictly construed as such, and if penal it necessarily follows that the action upon it will not survive the death of the person for whom the penalty was intended, and the executors are not liable. 3 Williams on Executors (6th Am. Ed.) bottom page 1729; Hambly v. Trott, Cowp. 372; United States v. Daniel, 6 How. 11, 12 L. Ed. 323. * * *

There is no error in the judgment complained of. In this opinion the other Judges concurred.[81]

[81] Compare Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892).

INDEX

[THE FIGURES REFER TO PAGES]

ACCEPTANCE,
Of charter, see Formation.
Of amendments, see Powers of Majority.
Of subscription, 135.

ACTIONS,
By stockholders, see Stockholders.
By creditors, see Creditors.
By and against de facto corporations, see De Facto Corporations.
Against promoters, see Promoters.

AGENTS,
See Promoters.

ALTERATION,
Of charter, see Legislative Control.

AMENDMENT,
Of charter, power of majority, 491, 497.
See, also, Legislative Control.

ARTICLES OF ASSOCIATION,
See Formation.

ASSETS,
As a trust fund, see Creditors.

ATTACHMENT,
See Transfer of Stock.

BILLS AND NOTES,
See Powers and Liabilities.

BOOKS,
Inspection of, see Stockholders.

BORROWING,
Implied power, 236.
From director, 641.

CAPITAL STOCK,
Distinguished from shares, 32–37.
Taxation of, 32, 37.

CERTIFICATES,
Of stock, see Transfer of Stock.

CHARTER,
Amendment of, see Amendment; Legislative Control.
Repeal of, see Legislative Control.
Interpretation of, see Powers and Liabilities.

CONDITIONS,
In subscription contract, 144, 146.

CONDITIONS PRECEDENT,
To formation, see Formation.

CONTRACTS.
Effect of dissolution on, 715.
Ultra vires, see Ultra Vires Acts.
By promoters, see Promoters.

[The figures refer to pages]

CORPORATION,
Distinguished from,
A partnership, 1, 8.
A joint-stock association, 4.
Its stockholders, 18.
As a person, 47.

CORPORATION DE FACTO,
See De Facto Corporations.

CREDITORS,
Remedies against corporation,
Against public service companies, 730, 732.
By simple-contract creditors, 740, 742, 748, 751.
By judgment creditors, 752.
Remedies against transferee of corporate property.
When transferee is a continuation of the old corporation, 758, 759, 761.
The "trust fund" theory, 763, 766, 771, 774.
At law, 778.
Rights as affected by consolidation or merger,
On assumption of liability, 779, 783.
In absence of assumption, 785, 786.
Rights as affected by dissolution, 789, 790.
See, also, Dissolution.
Rights against stockholders and their transferees,
At common law,
Jurisdiction, 793, 795.
Rights against stockholders purchasing corporate property, 798.
Right to compel payment of unpaid subscription, 802, 804.
Set-off by stockholder, 806.
Defense by stockholder, 808, 810.
Liability of transferee of stock for future calls, 813.
Liability of transferor who transfers to escape liability, 814.
Liability of transferee by way of security, 815.
Liability of stockholder on stock issued at less than par, 817.
Liability of stockholders who have exchanged property for stock, 821.
Liability of stockholder who has received stock in exchange for debt due, 823.
Effect of contract relieving stockholder from liability, 827.
Liability of innocent holder of stock fraudulently represented as full-paid, 831.
By statute,
Nature of liability, 836.
Nature of action, 838,
Set-off by stockholder, 841.
Termination of liability, 844.
Liability of stockholder after distribution, 846.
Rights against officers,
Right against officers for injury to corporation, 848, 852.
Right to recover property conveyed to officer, 850.
Nature of statutory liability for neglect of duty, 856.

CRIMES,
See Ultra Vires Acts.

CUMULATIVE VOTING,
See Stockholders.

DEBTS,
Effect of dissolution on, 719, 725.

DE FACTO CORPORATIONS,
Individual liability of members, 79, 81, 88, 89, 92.
Requisites in creating, 79.

[The figures refer to pages]

DE FACTO CORPORATIONS—Continued.
Necessity of law under which organization might have been perfected. 81, 83.
Estoppel to deny corporate existence, 96, 101, 104.
DELEGATION,
Of power, see Directors.
DIRECTORS,
Powers and liabilities.
Nature and extent of powers, 603, 604, 608.
Delegation of power, 612, 615.
Liability for negligence, 617, 627.
Fiduciary relationship of, to company, 632, 637, 641, 644, 647, 649.
Remedies against,
Removal of, 652.
Nature of action against, 654.
DISSOLUTION,
Methods of,
Power of court of equity, 692.
Effect of breach of condition making charter "null and void," 694.
Effect of insolvency, 696, 698.
Effect of consolidation, 703.
Causes for,
Violation of duty not expressly made a ground of forfeiture, 706.
Waiver of forfeiture, 710.
Effect of,
On judgment against dissolved corporation, 712.
On contracts with the corporation, 715.
On debts due the corporation, 719, 725.
On title to corporate realty, 723.
On creditors' rights, see Creditors.
DISTRIBUTIVE SHARE,
See Stockholders.
DIVIDENDS,
See Stockholders.

EMINENT DOMAIN,
As affecting amendment of charter, see Legislative Control.
EQUITY,
Federal equity rule 94, see Stockholders.
ESTOPPEL,
See De Facto Corporations; Ultra Vires Acts.
EXECUTION,
See Transfer of Stock.

FORFEITURE,
Of charter, see Dissolution.
FORMATION,
Steps essential to organization,
Substantial compliance with law, 60, 62, 88.
Acceptance of charter,
Under special law, 65.
Under general law, 75.
Effect of failure to comply with law, see De Facto Corporations.
Subscription to stock,
Distinction between subscription and agreement to subscribe, 112, 114.
Revocability of subscription, 116, 121.
Conditional subscription, 127.
When status of stockholder arises, 135, 139, 141, 154.
Conditional subscriptions, 144, 146, 150, 154.
Rescission of subscription contract, 158, 161.
Promoters, see Promoters.

[The figures refer to pages]

FRAUD,
Rescission of subscription for, after insolvency, 808, 810.

FRAUDS, STATUTE OF,
See Transfer of Stock.

INCORPORATION,
See Formation.

INDEMNITY,
Of director by promoter, 649.

INSPECTION,
Of books and records, see Formation.

INTERPRETATION,
Of charters, see Powers and Liabilities.

JOINT-STOCK ASSOCIATION,
Distinguished from corporation, 4.

LEASES,
See Powers and Liabilities.

LEGISLATIVE CONTROL,
Legislative power to repeal charter, 658.
Legislative power to alter or amend so as to,
Take property without compensation, 665.
Discriminate against a corporation in taxation, 668.
Compel public service companies to render adequate service, 672.
Affect stockholders' contracts, 674, 678.
Where corporate powers may not be granted by special act, 683.
As affected by the police power, 685.
As affected by the power of eminent domain, 688.

LIABILITY,
See Powers and Liabilities.

LIBEL,
Power of corporation to utter, 395.

LOANS,
Borrowing, see Powers and Liabilities.

MAJORITY,
See Powers of Majority.

MALICIOUS PROSECUTION,
Liability of corporation for, 390.

MANDAMUS,
To inspect records, 407, 409, 413.

MERGER,
As affecting rights of creditors, see Creditors.

MORTGAGES,
See Powers and Liabilities.

NEGLIGENCE,
Liability of directors for, see Directors.

NEGOTIABLE INSTRUMENTS,
See Powers and Liabilities.

OFFICERS,
Rights of creditors against, see Creditors.

ORGANIZATION,
See Formation.

[The figures refer to pages]

PARTNERSHIP,
Distinguished from corporation, see Corporation.

PERSON,
Corporation as, see Corporation.

POLICE POWER,
As affecting amendment of charter, see Legislative Control.

POWERS AND LIABILITIES,
Interpretation of charters and franchises, 209.
Implied powers,
To buy real estate, 216, 219.
To dispose of whole of property, 224, 226.
To lease, 229, 233.
To borrow money, 236.
To issue and indorse negotiable paper, 241.
To mortgage property, 244, 245, 248.
To become surety, 254, 258.
To enter into partnership, 260.
To buy and sell stock in other corporations, 264, 266, 268, 273, 274, 278.

PREFERRED STOCK,
Participation in dividends, 460, 466.

PROMOTERS,
As fiduciaries, 164, 170, 174, 180.
Promoters' contracts,
Liability of company, 186.
Adoption of contracts, 188, 190.
Acceptance of benefits, 194, 199, 206.
Agreement to indemnify directors, 649.

PROPERTY,
Taking without compensation, 658.

PROXY,
See Stockholders.

QUASI CONTRACT,
See Ultra Vires Acts.

REAL ESTATE,
Title to on dissolution, see Dissolution.

REMOVAL,
Of directors, see Directors.

SET-OFF,
By stockholders,
In action against corporation, 45.
In action by creditors, see Creditors.

SHAREHOLDERS,
See Stockholders.

SPECIAL LAWS,
Acceptance of charter under, see Formation.

STOCK,
Transfer of, see Transfer of Stock.

STOCKHOLDERS,
Rights incident to statute.
To inspect records, 407, 409, 413.
To vote,
Who may vote, 418, 421.
Number of votes, 423.

[The figures refer to pages]

STOCKHOLDERS—Continued.
Cumulative voting, 428.
Voting by proxy, 429, 432, 435, 441.
To dividends,
Right to compel payment of, 445.
Right to declared dividend, 452.
Nature of interest in dividend declared, 457.
On preferred stock, 460, 466.
To distributive share, 470, 475.
Powers of majority,
Extent of discretion, 477.
Effect of adverse interest, 479, 483.
Power to change nature of business, 488, 491, 497.
Power to accept amendments, 491, 497.
Representative suits,
Right to represent corporation, 499, 503.
Power of majority to forgive injury, 509, 514, 519.
Necessity of request to corporation to sue, 523, 526.
Form of request, 529.
Proof that plaintiff is a stockholder, 532.
Plaintiff's motive in bringing suit, 534.
Necessity of being stockholder at date of injury, 537.
Plaintiff's motive in purchasing stock, 541.
Federal equity rule 94, 545, 548, 555, 557, 564.

SUBSCRIPTIONS TO STOCK,
See Formation.

SURETY,
Power to become surety, see Powers and Liabilities.

TAXATION,
Of capital stock, 32, 37.

TORTS,
See Ultra Vires Acts.

TRANSFER OF STOCK,
Attachment and execution, 572, 574.
Application of statute of frauds, 580.
Necessity of transfer on books of corporation,
As against creditors, 581.
As against the corporation, 583.
Theft of indorsed certificate, 586.
Duty of corporation in making transfer, 589.
Estoppel of corporation to deny validity of certificate, 594, 597.

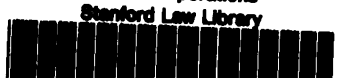
ULTRA VIRES ACTS,
Nature of ultra vires act, 285, 300, 301.
Contracts,
Executory, 306, 309, 311, 315.
Executed contracts and leases, 318, 321, 324, 326, 329, 331.
Title under ultra vires transfers, 335, 336, 339, 341, 345, 352.
Estoppel, 359, 361, 363.
Rights in quasi contract, 361, 369, 373, 376, 378.
Torts, 381, 390, 395.
Crimes, 396, 402, 403.

VOTING,
See Stockholders.

WEST PUBLISHING CO., PRINTERS, ST. PAUL, MINN.

STANFORD UNIV. S[illegible] W [illegible]BRARY

CT BRK XHc
Cases on private corporations
Stanford Law Library



3 6105 044 206 477